Calendar No. 229

98TH CONGRESS *1st Session*	SENATE	REPORT No. 98-147

THE BAIL REFORM ACT OF 1983

REPORT

OF THE

COMMITTE ON THE JUDICIARY

UNITED STATES SENATE

ON

S. 215

MAY 25, 1983.—Ordered to be printed

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(98th Congress)

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MAY 25, 1983.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 215]

The Committee on the Judiciary, to which was referred the bill (S. 215), to amend the Bail Reform Act of 1966 to permit consideration of danger to the community in setting pretrial release conditions, to expand the list of statutory release conditions, to establish a more appropriate basis for deciding on post-conviction release, and for other purposes, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF THE BILL

S. 215 substantially revises the Bail Reform Act of 1966[1] in order to address such problems as a) the need to consider community safety in setting nonfinancial pretrial conditions of release, b) the need to expand the list of statutory release conditions, c) the need to permit the pretrial detention of defendants as to whom no conditions of release will assure their appearance at trial or assure the safety of the community or of other persons, d) the need for a more appropriate basis for deciding on post-conviction release, e) the need to permit temporary detention of persons who are arrested while they are on a form of conditional release or who are arrested for a violation of the Immigration and Nationality Act, and f) the need to provide procedures for revocation of release for violation of the conditions of release. Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that federal bail laws must address the alarming problem of crimes

[1] 18 U.S.C. 3146 et seq.

committed by persons on release and must give the court adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released. The adoption of these changes marks a significant departure from the basic philosphy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.

Introduction

In the 97th Congress the "Bail Reform Act of 1981", S. 1554, was introduced by Chairman Thurmond and Senators Hatch, Kennedy, Baucus, Bumpers, DeConcini, Denton, Laxalt, and Specter on July 31, 1981. The bill was referred to the Judiciary Committee which assigned it to the Subcommittee on the Constitution. The Constitution Subcommittee, chaired by Senator Hatch held hearings on the bill on September 17, and October 21, 1981.[2] The Subcommittee then approved S. 1554 with an amendment by a vote of 4–0. The full Judiciary Committee considered the amended bill on December 8, 1981. After discussion of its provisions, the Committee approved the bill by a voice vote and ordered it favorably reported with amendments. On March 4, 1983, Senator Hatch reported S. 1554 to the Senate (S. Report No. 97–317). S. 1554 was then incorporated into S. 2572, the "Violent Crime and Drug Enforcement Improvements Act of 1982". S. 2572 was passed by the Senate on September 30, 1982 by a record vote of 95–1.

In the 98th Congress the "Bail Reform Act 1983", S. 215, was introduced on January 27, 1983 by Chairman Thurmond and Senators Biden, Hatch, Kennedy, Laxalt, DeConcini, Dole, Simpson, East, and others. The bill was referred to the Judiciary Committee which assigned it is the Subcommittee on the Constitution. S. 215 was passed unanimously out of Subcommittee on March 24, 1983, without amendment.

On May 10, 1983, the full Judiciary Committee took up S. 215. Senator Specter offered an amendment to reduce the current 90-day limit on pretrial detention to 60 days. After considering the views of the Justice Department against this amendment, which are included in a letter included as an appendix to this report, the Judiciary Committee rejected the amendment on a vote of 8–9. Following the vote on this amendment, the bill was ordered favorably reported on a unanimous voice vote.

History of Bail

Bail laws in the United States grew out of a long history of English statutes and policies. During the colonial period, Americans relied on the bail structure that had developed in England hundreds of years earlier. When the colonists declared independence in 1776, they no longer relied on English law but formulated their own policies which closely paralleled the English tradition. The ties between the institution of bail in the United States and England

[2] "Bail Reform," hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Congress, 1st Session (September 17 and October 21, 1981).

are especially evident in the American constitutional guarantees; the Eighth Amendment's statement that "excessive bail shall not be required" comes directly from English law. Statutory bail law in the United States is also based on the old English system. In attempting to understand the meaning of the American constitutional bail provisions and how they were intended to supplement a larger statutory bail structure, knowledge of the English system and how it developed until the time of American independence is essential.

In medieval England, methods to insure that the accused would appear for trial began as early as criminal trials themselves. Until the 13th century, however, the conditions under which a defendant could be detained before trial or released with guarantees that he would return were dictated by the local sheriffs.[3] As the regional representative of the crown, the sheriff possessed sovereign authority to release or hold suspects. The sheriffs, in other words, could use any standard and weigh any factor in determining whether to admit a suspect to bail. This broad authority was not always judiciously administered. Some sheriffs exploited the bail system for their own gain. Accordingly, the absence of limits on the power of the sheriffs was stated as a major grievance leading to the Statute of Westminster.[4]

The Statute of Westminster in 1275 eliminated the discretion of sheriffs with respect to which crimes would be bailable. Under the Statute, the bailable and non-bailable offenses were specifically listed.[5] The sheriffs retained the authority to decide the amount of bail and to weigh all revelant factors to arrive at that amount. The Statute, however, was far from a universal right to bail. Not only were some offenses explicitly excluded from bail, but the statutes restrictions were confined to the abuses of the sheriffs. The justices of the realm were exempt from its provisions.

Applicability of the statute to the judges was the key issue several centuries later when bail law underwent its next major change. In the early seventeenth century, King Charles I received no funds from the Parliament. Therefore, he forced some noblemen to issue him loans. Those who refused to lend the sovereign money were imprisoned without bail. Five incarcerated knights filed a habeas corpus petition arguing that they could not be held indefinitely without trial or bail. The King would neither bail the prisoners nor inform them of any charges against them. The King's reason for keeping the charges secret were evident: the charges were illegal; the knights had no obligation to lend to the King. When the case was brought before the court, counsel for the knights argued that without a trial or conviction, the petitioners were being detained solely on the basis of an unsubstantiated and unstated accusation. Attorney General Heath contended that the King could best balance the interests of individual liberty against the interests of state

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[3] Elsa de Haas, "Antiquities of Bail" 51-55 (1966).

[4] Id. at 76, 86-87.

[5] Edw. 1. c. 15 In addition to capital offenses, the list included "Thieves openly defamed and known," those "taken for House-burning feloniously done," or those taken for counterfeiting, and many other non-capital offenses.

security when exercising his sovereign authority to imprison. The court upheld this sovereign prerogative argument.[6]

Parliament responded to the King's action and the court's ruling with the Petition of Right of 1628. The Petition protested that contrary to the Magna Carta and other laws guaranteeing that no man be imprisoned without due process of law, the King had recently imprisoned people before trial "without any cause shewed." The Petition concluded that "no freeman, in any manner as before mentioned, be imprisoned or detained . . ."[7] The act guaranteed, therefore, that man could not be held before trial on the basis of an unspecific accusation. This did not, however, provide an absolute right to bail. The offenses enumerated in the Statute of Westminster remained bailable and non-bailable. Therefore, an individual charged with a non-bailable offense still could not contend that he had a legal entitlement to bail.

The King, the courts and the sheriffs were able to frustrate the intent of the Petition of Right through procedural delays in granting the writs of habeas corpus. In 1676, for example, when Francis Jenkes sought a writ of habeas corpus concerning his imprisonment for the vague charge of "sedition", it was denied at first because the court was "outside term", and later because the case was not calendared; furthermore, when the court was requested to calendar the case, it refused to do so. In response to the rampant procedural delays in providing habeas corpus as evidenced by *Jenkes' Case,*[8] Parliament passed the Habeas Corpus Act of 1677. The act strengthened the guarantee of habeas corpus by specifying that a magistrate:

> shall discharge the said Prisoner from his Imprisonment taking his or their Recognizance, with one or more Surety or Sureties, in any Sum according to their Discretion, having regard to the Quality of the Prisoner and Nature of the offense, for his or their Appearance in the Court of the King's bench . . . unless it shall appear . . . that the Party [is] . . . committed . . . for such Matter or Offenses for which by law the Prisoner is not bailable.[9]

By requiring early designation of the cause for arrest, the Habeas Corpus Act provided a suspect with knowledge that the alleged offense was either bailable or not. The Statute of Westminster remained the primary definition of what offenses would be eligible for bail.

Although the Habeas Corpus Act improved administration of bail laws, it provided no protection against excessive bail requirements. Even if a suspect was accused of a bailable offense and therefore was entitled to some bail, he could still be detained if the financial condition of release was exorbitantly high. As evidence of this abuse reached Parliament, it responded with the English Bill of Rights of 1689. In the Preamble, the bill accused the King of attempting "to subvert . . . the laws and liberties of the kingdom" in

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[6] "Five Knights Case" or "Proceedings on the Habeas Corpus" brought by Sir Thomas Darnel, 3 St. Fr. 1 (1627).
[7] William Duker, "The Right to Bail: A Historical Inquiry" 64, 42 Albany L. Rev. 33 (1977).
[8] Jenkes Case, 6 St. Tr. 1190 (1676).
[9] 31 Car. 2 c. 2.

that "excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects." [10] The Bill of Rights proposed to remedy the situation by declaring "that excessive bail ought not to be required." [11] Thus, the precursor of the Eighth Amendment in the U.S. Constitution was drafted to prevent those accused of bailable offenses from unreasonable bail requirements. It did not alter the categories of bailable crimes found in the separate Statute of Westminster and certainly did not guarantee a right to bail.

The language of the English Bill of Rights was only one part of the bail system developed through many years of English law. As Caleb Foote has explained and this analysis recounts, English protection against unjustifiable detention contained three essential elements: first, offenses were categorized as bailable or not bailable by statutes beginning with Westminster I which also placed limits on which judges and officials could effect the statute; second, habeas corpus procedures were developed as an effective curb on imprisonment without specific charges; and third, the excessive bail clause of the 1689 Bill of Rights protected against judicial officers who might abuse bail policy by setting excessive financial conditions for release. English law never contained an absolute right to bail. Bail could always be denied when the legislature determined certain offenses were unbailable. Most of the history of bail law after Westminster I was an attempt to improve the efficiency of existing law and especially to grant the suspect a meaningful chance to satisfy bail conditions when he had committed those offenses that the legislature had declared bailable.

In Colonial America, bail law was patterned after the English law. While some colonies initiated their own laws which were very similar to English statutes, others simply guaranteed their subjects the same protections guaranteed to British citizens. When the colonies became independent in 1776, however, they could no longer simply insure the protections of English law. Accordingly, the colonies enacted specific bail laws. Typical of the early American bail laws were those enacted in Virginia perpetuating the bail system as it had evolved in England. Section 9 of Virginia's Constitution in 1776 declared simply that "excessive bail ought not to be required . . ." [12] This constitutional provision was supplemented in 1785 with a statute which eliminated judges' discretion to grant bail by specifying that "those shall be let to bail who are apprehended for any crime not punishable in life or limb . . . But if a crime be punishable by life or limb, or if it be manslaughter and there be good cause to believe the party guilty thereof, he shall not be admitted to bail".[13] Thus, the Virginia laws closely paralleled the English system. Statutes defined which offenses were bailable while the Constitution protected against abuses of those definitions. In fact, the clause in the Virginia Constitution was identical to the one in the English Bill of Rights which had been included to prevent judges from unreasonably holding those accused of bailable of-

[10] W. & M. st. 2 c. 2 preamble clause 10.
[11] 1 W. & M. st. 2 c. 2, rights clause 10.
[12] 7 American Charters 3813 (F. Thorpa ed., 1909).
[13] 12 Va. Stat. 185–86 (W. Hening ed., 1823).

fenses by setting bail so high as to be unobtainable. Other State constitutions similarly proscribed excessive bail for bailable offenses in order to prevent this method of thwarting the bail laws, passed by the legislatures: for example, section 29 of the Pennsylvania Constitution of 1776 provided that "Excessive bail shall not be exacted for bailable offenses."[14]

With James Madison designated to prepare an initial draft for Bill of Rights in 1789, the Virginia Constitution, often referred to as the Virginia Bill of Rights, became the model for the first ten amendments that passed Congress in 1789 and were ratified in 1791. The Eighth Amendment in this Bill of Rights was taken virtually verbatim from Section 9 of the Virginia Constitution and provided that "Excessive bail shall not be required . . ." The only comment on the clause during the congressional debates was made by the perplexed Mr. Livermore: "The clause seems to have no meaning to it, I do not think it necessary. What is meant by the terms excessive bail . . .?"[15]

Indeed, it seems the drafters thought relatively little about the meaning of the bail clause; the clause was so rooted in American and English history that to most, the meaning was obvious. Like the identical clause in the English Bill of Rights and the Virginia Constitution, the Eighth Amendment bail provision was intended to prohibit excessive bail as a means of holding suspects accused of offenses deemed bailable by Congress.

The bail clause in the Eighth Amendment was only one part of the American bail structure.[16] As in England, the American system also includes gurantees against imprisonment without informing the suspect of his crime. The Sixth Amendment to the Constitution, like the English Habeas Corpus Act of 1678, insures that when arrested, a man "be informed of the nature and cause of the accusation" thereby enabling him to demand bail if he has committed a bailable offense. The final part of the American bail structure and the element upon which the Constitution provisions are based is the statutory codification of justice officials' power concerning bail and the categorization of crimes into bailable and nonbailable offenses. The Constitution merely guarantees that excessive bail may not be employed to hold suspects who by law are entitled to bail; similarly the Six Amendment enables prisoners to know if they are in fact entitled to bail under the law—it does not give them any right to bail not already existing in the law. Thus, the legislature and not the Constitution is the real framer of bail law; the Constitution upholds and protects against abuse the system which the legislature creates. This principle was well understood by the Framers of the Bill of Rights. In fact, the same Congress that proposed the Eighth Amendment also formulated the fundamental bail statute that remained in force until 1966. This was accomplished in 1789, the same year that the Bill of Rights was introduced, when Congress passed the Judiciary Act. The Act specified which types of crimes were bailable and set bounds on the

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[14] 7 American Charters 3813 (F. Thorpa ed., 1909).

[15] 1 "Annals of Congress" 754 (1789).

[16] Caleb Foote, "The Coming Constitutional Crisis in Bail," 113 Pennsyvania L. Rev. 959, at 963 (1965). Hermine Herta Meyer, "The Constitutionality of Pretrial Detention," 60 Georgetown L. Rev. 1139 (1972).

judges' discretion in setting bail. Following the tradition of State laws developed during the colonial period which in turn were based on English law,[17] the Judiciary Act stated that all noncapital offenses were bailable and that in capital offenses, the decision to detain a suspect before trial was left up to the judge:

> [U]pon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstance of the offense, and of the evidence, and the usages of law.[18]

The sequence of events in the First Congress pertaining to American bail policy is critical to an understanding of the Framers of the Eighth Amendment and the Judiciary Act of 1789. Only a few days after final passage of the Bill of Rights in Congress on September 21, 1789, and before its final adoption, the First Congress passed the Judiciary Act of 1789 on September 29, 1789. In fact, these two legislative measures were debated almost concurrently. Considerable debate time was consumed in the House of Representatives over the issue of which should be enacted first, the bill creating a federal judiciary and federal judicial procedures or the amendments to the Constitution. Eventually Madison's point of view that the Bill of Rights should take precedence so that "the independent tribunals of justice will consider themselves. . . the guardians of those rights" [19] prevailed. But the same day the House completed the Bill of Rights it proceeded to perfect the Judiciary Act of 1789 which was already approved by the Senate. The two legislative proposals passed each other going and coming between the House and the Senate. This historical footnote illuminates significantly the context in which these measures were debated. They were almost considered simultaneously. Often representatives argued that changes in one measure were unnecessary because the other provided ample protection for vital rights.[20]

This context suggests strongly that the First Congress acted very purposefully in substantially adopting the English system of tripartite protection against bail abuses. The Eighth Amendment prohibition against excessive bail meant that bail may not be excessive in those cases where Congress has deemed it proper to permit bail. The Congress then enacted the Judiciary Act defining what offenses would be bailable. Habeas corpus protection was afforded by Article I of the Constitution.

The argument that the excessive bail clause guarantees a right to bail by necessary implication and that the provision forbidding excessive bail would be meaningless if judges could deny bail altogether in some cases is clearly not valid in this historical context. The same Congress which drafted the Eighth Amendment enacted the Judiciary Act which specifically denied a right to bail to individuals charged with a capital offense.

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[17] Duker, Supra note 7 at 77–83.
[18] The Judiciary Act of 1789, 1 Stat. 73, 91.
[19] 1 "Annals of Congress" 428, 432 (1789).
[20] Id. at 448.

In the context of its legislative history, the Eighth Amendment is illuminated by reading it in conjunction with the Judiciary Act of 1789. The First Congress adopted the Amendment to prevent judges from setting excessive bail in cases prescribed as bailable by Congress. The same legislators then enacted a bill prescribing which offenses would be bailable. The Eighth Amendment, therefore, is not self executing. It requires legislation creating legal entitlements to bail to give it effect. Recognizing this, the First Congress provided almost simultaneously the legislation that gave the Amendment effect. The First Congress did not choose a strange legal arrangement; it chose precisely the system most familiar to these former English citizens. The First Congress recognized that the Amendment was not intended to limit congressional discretion to determine the cases for which bail would be allowed, but was designed to circumscribe the authority of courts to ignore or circumvent that congressional policy with excessive bail requirements.

The Judiciary Act of 1789 did not differentiate between bail before and after conviction. Not until 1946 in the Federal Rules of Criminal Procedure was this distinction clearly made. Rule 46 made the 1789 Act's language the standard for release, but left release after conviction pending an appeal or application for certiorari to the judge's discretion regardless of the crime.

In 1966 Congress enacted the first major substantive change in federal bail law since 1789. The Bail Reform Act of 1966 provides that a non-capital defendant "shall . . . be ordered released pending trial on his personal recognizance" or on personal bond unless the judicial officer determines that these incentives will not adequately assure his appearance at trial.[21] In that case, the judge must select the least restrictive alternative from a list of conditions designed to guarantee appearance. That list includes restrictions on travel, execution of an appearance bond (refundable when the defendant appears), and execution of a bail bond with a sufficient number of solvent sureties. Individuals charged with a capital offense, or who have been convicted and are awaiting sentencing or appeal are subject to a different standard. They are to be released unless the judicial officer has "reason to believe" that no conditions "will reasonably assure that the person will not flee or pose danger to any other person or to the community."

The 1966 Act thus created a presumption for releasing a suspect with as little burden as necessary in order to insure his appearance at trial. Appearance of the defendant for trial is the sole standard for weighing bail decisions. In noncapital cases, the Act does not permit a judge to consider a suspect's dangerousness to the community. Only in capital cases or after conviction is the judge authorized to weigh threats to community safety.

This aspect of the 1966 Act drew criticism particularly in the District of Columbia where all crimes formerly fell under the regulation of Federal bail law. In a considerable number of instances, persons accused of violent crimes committed additional crimes while released on their own personal recognizance. Furthermore, these individuals were often released again on nominal bail.

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[21] The Bail Reform Act of 1966, 18 U.S.C. 3146 et seq.

The problems associated with the 1966 Bail Reform Act were considered by the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia in May 1969. The Committee was particularly bothered by the release of potentially dangerous noncapital suspects permitted by the 1966 law and recommended that even in noncapital cases, a person's dangerousness be considered in determining conditions for release. Congress went along with the ideas put forth in the committee's proposals and changed the 1966 Bail Reform Act as it applied to persons charged with crimes in the District of Columbia. The District of Columbia Court Reform and Criminal Procedure Act of 1970 allowed judges to consider dangerousness to the community as well as risk of flight when setting bail in noncapital cases. The 1970 Act contained numerous safeguards against irrational application of the dangerousness provisons. For instance, an individual could not be detained before trial under the act unless the court finds that (1) there is clear and convincing evidence that he falls into one of the categories subject to detention under the act, (2) no other pretrial release conditions will reasonably assure community safety, and (3) there is substantial probability that the suspect committed the crime for which he has been arrested. This last finding was an overzealous exercise of legislative precaution. The Justice Department testifed that the burden of meeting this "substantial probability" requirement was the principal reason cited by prosecutors for the failure over the last 10 years to request pretrial detention hearings under the statute. Such a standard also had the effect of making the pretrial detention hearing a vehicle for pretrial discovery of the Government's case and harassment of witnesses. Moreover, the District of Columbia Court of Appeals in its *Edwards* [22] decision strongly suggests that the probable cause standard consistently sustained by the Supreme Court as a basis or imposing "significant restraints on liberty" would be constitutionally sufficient in the context of pretrial detention.

Overview of Federal Court Treatment of Bail

EIGHTH AMENDMENT

As stated earlier in the "History of Bail" section, the words of the Eighth Amendment prohibit only excessive bail requirements. The language of the Amendment thus restricts to some degree the discretion of judges to set bail at unreasonable levels. It leaves Congress with the power to establish which offenses, if any, shall be eligible for bail in the first place. This meaning of the language in the Eighth Amendment is evident from the meaning given those exact same words in English law and tradition from which they were derived.

The Supreme Court first acknowledged this understanding of the Eighth Amendment in *Ex Parte Watkins* with the statement that "the Eighth Amendment is addressed to the courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation on their discretion." [23] The implicit mes-

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[22] *United States* v. *Edwards*, No. 80-294 (D.C. App. May 8, 1981), (slip opinion), petition for cert. filed July 8, 1981.

[23] 32 U.S. 568, 574 (1833).

sage of this passage from *Watkins* was that Congress was not bound by the Constitution to create a right to bail. Subsequent court decisions followed the direction indicated by the *Watkins* court. For instance, the Sixth Circuit in 1926 noted that a right to bail must be grounded in statute.[24] The New York Court of Appeals interpreted the New York Constitution's excessive bail language to refer "only to the amount of bail."[25]

On occasion, however, a court did not investigative the historical record and articulated the notion that the Amendment required bail in all cases.[26] This minor confusion was clarified in 1951 when the Supreme Court directly addressed the issue. The Court had managed to avoid the issue for years primarily because the statutory standards for bail in the Judiciary Act of 1789 had been in place longer than the Eighth Amendment itself.

The Supreme Court finally decided two cases concerning bail in 1951. The first, *Stack* v. *Boyle*,[27] concerned the issue of "excessiveness;" and later, *Carlson* v. *Landon*[28] concerned the issue of whether detainees were entitled to bail as a right under the Eighth Amendment. In *Stack*, the Court held that bail set at $50,000 for suspects accused of conspiring to violate the Smith Act was excessive bail under the Eighth Amendment. The Court pointed to the tradition of statutory bail guarantees in noncapital cases as an argument for the importance of allowing pretrial freedom whenever possible. The only legitimate reason for restricting pretrial freedom in noncapital cases, argued Chief Justice Vinson writing for the court, was a likelihood that the defendant would not appear for trial. Thus, the Court held that:

> Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose (assuring appearance at trial) is "excessive" under the Eighth Amendment.[29]

It is significant that the decision did not concern the issue of denied bail; the question before the Court was merely the propriety of the amount of bail in the particular circumstances of the case. The language in the opinion referring to a tradition of pretrial freedom related only to long-standing statutory practice and implied no absolute constitutional right to bail. Indeed, the decision clearly recognized at least one factor which could restrict the statutory tradition of pretrial freedom—the risk that the suspect would fail to appear for trial.

Though *Stack* did not concern the issue of whether the Eighth Amendment guarantees an absolute constitutional right to fail, the Supreme Court did decide this issue only a few months later in *Carlson* v. *Landon*.[30] *Whereas Stack* involved defendants who were bailed but claimed the bail set was excessive, *Carlson* concerned defendants who had been detained without bail. The suspects, aliens belonging to the Communist Party, were held pursuant to section 23 of the Internal Security Act of 1950 which permitted the Attor-

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[24] *Prentis* v. *Manoogian*, 15 F. 2d 422 (6th Cir. 1926).
[25] *Shapiro* v. *Keeper of City Prisons*, 290 N.Y. 393, 49 N.E. 2d 498 (1943).
[26] *United States* v. *Motlow*, 10 F. 2d 657 (7th Cir. 1926).
[27] 342 U.S. 1 (1951).
[28] 342 U.S. 524 (1952).
[29] 342 U.S. at 5.
[30] *Supra* note 28.

ney General to detain aliens who were members of the Communist Party pending a determination of their deportability. The Court in *Carlson* upheld the right of Congress to deny bail despite the tradition of statutory guarantees of pretrial freedom which the same Court had alluded to in *Stack*. The opinion of the Court, written by Justice Reed and joined by Chief Justice Vinson who had just written *Stack*, reasoned that the Eighth Amendment bail clause like the English Bill of Rights from which it was taken, was only meant to prohibit excessive bail in those circumstances where Congress had already legislated a right to bail. The Eighth Amendment, according, to the Court does not prevent Congress from defining bailable and nonbailable offenses:

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. This in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.[31]

Thus with *Carlson* the question was resolved with the declaration that Congress was entrusted with the power to delineate those offenses for and circumstances under which bail may be denied.

In spite of the clear reasoning set forth by *Stack* and *Carlson*, the United States District Court for the District of Columbia decided *Trimble* v. *Stone*[32] which mentioned an absolute right to bail. *Trimble* concerned a fifteen-year-old arrested for sexual assault and detained under the Juvenile Court Act for the District of Columbia. The defendant claimed he was entitled to bail under the Eighth Amendment and the District Court upheld his claims. The *Trimble* ruling, however, runs counter to an overwhelming body of subsequent court law upholding *Carlson*. For instance in *U.S. ex rel. Covington* v. *Caparo*, The United States District Court for the Southern District of New York upheld a denial of bail to a murder suspect:

> The Eighth Amendment * * * does not mention, much less distinguish between, capital and other felonies. It is true * * * that some courts have construed the Eighth Amendment to guarantee the right to bail on all but capital cases, but such statements must be considered in the context of the congressional statute governing bail, rather than as a command under the Eighth Amendment.[33]

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[31] Id. at 545.
[32] 187 F. Supp. 483 (D.D.C. 1960).
[33] *U.S. ex. rel. Covington* v. *Coparo*, 297 F. Supp. 203, 205 (S.D.N.Y. 1969).

Numerous other decisions take the same reasoned approach.[34] In summary, the only constitutional right conferred by the Eighth Amendment is a guarantee that bail shall not be excessive.

LEGAL RECOGNITION OF DANGEROUSNESS

United States v. *Gilbert* [35] addressed the question of whether pretrial detention was constitutional if a defendant threatened the safety of witnesses. The United States Court of Appeals for the District of Columbia held that the judicial interest in detaining the suspect outweighs his statutory right to bail and that detention was permissible:

> The necessities of judicial administration prevail, and the right to bail is not literally absolute * * * the courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial.[36]

Significantly, *Gilbert* did not consider dangerousness to the general public, but only to witnesses. In addition, it required that pretrial detention, even when based on threats to witnesses, must be preceded by a hearing at which the defendent had an ample opportunity to refute the charges against him.

Another case, *United States* v. *Wind* [37] also considered dangerousness in terms of threats to witnesses but hinted that a more general definition of dangerousness could be accepted. Like *Gilbert*, *Wind* held that a suspect who threatened or harmed a witness could be detained on the basis of sound judicial administration. The 1975 opinion further stated, however, that a suspect's dangerousness to the general public might also be considered in setting pretrial release conditions:

> We hold that in a pretrial bail hearing of a noncapital offense, a judicial officer may consider evidence that the defendant has threatened witnesses and is a danger to the community in determining whether the defendant should be released pursuant to 18 U.S.C. sec. 3146.[38]

Wind expanded the traditional interpretation of federal bail law, therefore, as it allowed a suspect to be denied the release procedure set forth in the 1966 Bail Reform Act if he was a danger to the community.

A further indication that the Federal courts would allow judges to consider dangerousness to the community in holding suspects came in the 1972 decision of *United States* v. *Honeyman*. In that decision the Ninth Circuit Court of Appeals reduced the bail set by a lower court for a man accused of perjury. In explaining why the original bail amount should be modified on account of the defendant's record, the court stated,

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[34] *U.S.* v. *Smith*, 444 F. 2d 61 (8th cir. 1971); *Bloss* v. *Michigan*, 421 F. 2d 903 (6th cir. 1970); *Wagner* v. *U.S.*, 250 F. 2d 804 (9th cir. 1957).
[35] *U.S.* v. *Gilbert*, 425 F.2d 490 (D.C. Cir. 1969).
[36] Id. at 491.
[37] *United States* v. *Wind*, 527 F.2d 672 (6th Cir. 1975).
[38] Id. at 675.

> Certainly in this case the offense charged, perjury, while a serious offense, is not of a type indicates that the defendant is a danger to the community, nor do we think that it establishes a prima facie case for the assumption that he is likely to flee.[39]

Even though the suspect was not found to be dangerous and his bail was reduced accordingly, the fact that the court included dangerousness along with likelihood of flight as a consideration in pretrial conditions indicates that, conversely to the *Honeyman* decision, if a man was found to be dangerous to the community, his release could be restricted.

By the mid 1970's a trend had been established of allowing consideration of a suspect's potential danger to future witnesses and, in some decisions, his dangerousness to the general public when determining release conditions. Decisions like *Gilbert*, *Wind* and *Honeyman* did not directly address the issue of statutory preventive detention; they concerned either court procedure or the 1966 Bail Reform Act which did not provide for preventive detention. In 1974 a case did arise in which a preventive detention statute was tested; yet even then the court did not rule on the most explicit preventive detention provisions. *Blunt* v. *United States* [40] concerned a man detained for threatening a witness and upheld the constitutionality of parts of the 1970 District of Columbia Criminal Procedures Act which provided for pretrial detention of dangerous criminals. While the court upheld the constitutionality of D.C. Code 1973, section 23-1322(a)(3) which provides for detention of dangerous suspects to prevent obstruction of justice and threatening of witnesses, it did not pass judgment on the constitutionality of detention under D.C. Code 1973 section 23-1322(a) (1) or (2) which provide for detention to insure community safety. Nevertheless, the D.C. Court of Appeals did decide that pretrial detention on the basis of a defendant's dangerousness was, at least under some conditions, constitutional. Moreover, it did so in the context of a statute which, like none before, explicitly provided for preventive detention to insure community safety.

PRESUMPTION OF INNOCENCE AND DUE PROCESS

The most significant aspect of the *Blunt* opinion was that it straightforwardly rejected some of the traditional arguments against pretrial detention in general and preventive detention in particular. Significantly, the court not only dismissed an absolute Eighth Amendment right to bail but also rejected claims that the evidentiary rule concerning a presumption of innocence, presumably linked to the Fifth Amendment, would prohibit pretrial detention of any kind.

> The presumption of innocence, however, has never been applied to situations other than the trial itself. To apply it to the pretrial bond situation would make any detention for inability to meet conditions of release unconstitutional. No cases so hold, and the history of criminal jurisprudence

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[39] *United States* v. *Honeyman*, 470 F. 2d 473, 475 (1972).
[40] *Blunt* v. *United States*, 322 A. 2d 579 (1974).

> in this country and England, where many are held for inability to meet release conditions, reveals the inapplicability of the presumption to pretrial detention.[41]

The Fifth Amendment forbids any official restraints on liberty without "due process of law." If this were interpreted to mean that no individual could be detained before convicted, law enforcement officers would also be barred from apprehending any suspect to stand trial. Other observers of the system have made the same point:

> If such a pretrial presumption of innocence existed as a bar to detention of the dangerous before trial, it would also bar pretrial detention of those charged with capital offenses, those held on money bond and could even be extended to prevent police from arresting persons and taking them into custody on probable cause.[42]

Clearly the Fifth Amendment cannot be construed as an absolute ban on pretrial detention. The Supreme Court has provided a more reasonable reading of the amendment:

> [T]he fact that a liberty cannot be inhibited without due process does not mean that it can under no circumstances be inhibited.
>
> The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction.[43]

Accordingly, the individual's liberty must be balanced against the society's reasons for restraint. In the case of conditions placed on pretrial liberty, there are two bases for the restrictions: to insure the individual will appear to stand trial and to protect the community. Already the Supreme Court has upheld various forms of detention as a means of protection.[44]

While *Blunt* clearly showed that preventive detention is not a *prima facie* violation of due process, the courts have described certain limits to pretrial restriction procedures based on the due process clause. In *Morrisey* v. *Brewer*[45] the Supreme Court held that a man's parole could not be revoked without a hearing. Three years later in *Gerstein* v. *Pugh*[46] the same Court applied the *Morrisey* standard to pretrial release procedure. The Court ruled that a suspect is entitled to a timely hearing before a magistrate for a "judicial determination of probable cause a a prerequisite to extended restraint of liberty following arrest"[47] *Gerstein* change the *Morrisey* standard somewhat, however, for while *Morrisey* described a set of procedural rules required at the hearing such as the right of the parolee to cross examine witnesses against him, *Gerstein* held that

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[41] Id. at 584.

[42] John N. Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention." 55 Virginia L. Rev. 1223, 1231–32 (1969).

[43] *Zemel* v. *Rusk*, 381 U.S. 1, 14 (1965).

[44] *Greenwood* v. *United States*, 350 U.S. 366 (1956), allows detention of those incompetent to stand trial who may endanger safety of the community. *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940) allows detention of sexual psychopaths deemed dangerous.

[45] 408 U.S. 471 (1972).

[46] 420 U.S. 103 (1974).

[47] Id. at 114.

"the full panoply of adversary safeguards—counsel, confrontation, cross examination, and compulsory process for witnesses" [48] is not constitutionally required. Thus, according to *Gerstein*, the only due process requirement for pretrial detention is a hearing at which a determination of probable cause is made that the suspect had indeed committed the crime with which he has been charged.

In 1978, the Supreme Court again had the opportunity to rule on due process requirements under pretrial detention. This case focused on pretrial detention centers where the detainees were subject to various restrictions. In *Bell* v. *Wolfish,* the Superme Court held that the restrictions were not a violation of due process even through the detainees had not been convicted. Though *Bell* concerned restrictions imposed after detention and not the validity of the decision to hold suspects itself, the opinion upheld the basic principle that restrictions in advance of adjudications need not be unconstitutional.

As in *Blunt* v. *United States,* the Court in *Bell* rejected outright the agrument that the rule of evidence known as the presumption of innocence and presumably linked to the Fifth Amendment applies before trial;

> Without question, the presumption of innocence plays an important role in our criminal justice system * * * But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.[49]

The Court did say, though, that under the due process clause, the "detainee may not be punished prior to an adjudication of guilt".[50] The question, then, is whether pretrail detention amounts to punishment. The Court answared that pretrial restriction of liberty is regulatory rather than punitive.

> Not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. . . the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert conditions or restrictions of detention into "punishment".[51]

Clearly, *Bell* has great pertinence to the issue of pretrial detention but, like, the federal bail decisions before it, its holding was limited; the facts of *Bell* did not constitute a direct challenge to pretrial detention based solely on protecting community safety.

Not until 1980 in the District of Columbia Court of Appeals decision *United States* v. *Edwards* was this question put directly to a Federal Court. The *Edwards* decision concerned a man accused of armed rape and detained pursuant to the 1970 District of Columbia

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[48] Id. at 119.
[49] *Bell* v. *Wolfish,* 441 U.S. 520, 533 (1978).
[50] Id. at 535.
[51] Id. at 537.

Criminal Procedures Act on the basis of the risk he posed to the community. Whereas the earlier *Blunt* decision had upheld only the sections of this act requiring detention to prevent obstruction of justice and threatening of witnesses,[52] Edwards was detained under section (a) 1 of the Act. This decision, therefore, upheld the specific provision of the 1970 Act permitting detention on the basis of dangerousness. Defendant Edwards claimed that the preventive detention statute deprived him both of an Eighth Amendment constitutional right to bail and of his right to due process of law. The court dismissed both these claims. On the constitutional right to bail the court went along with the well-established pattern of describing the bail right as a statutory tradition rather than an absolute constitutional right:

> While the history of the development of bail reveals that it is an important right, and bail in noncapital cases has traditionally been a federal statutory right, neither the historical evidence nor contemporary fundamental values implicit in the criminal justice system requires recognition of the right to bail as a "basic human right" which then must be construed to be of constitutional dimensions [53]

As in *Bell* v. *Wolfish*, Edwards asserted a due process infringement on the notion that preventive detention constituted punishment before conviction. As in the earlier decision concerning restrictions in detention facilities, *Edwards* declared that preventive detention itself is not punishment but regulation:

> Pretrial detention is regulatory rather than penal in nature * * * Pretrial detention to prevent repetition of dangerous acts under sec. 23-1322(a)1 by incapacitating the detainee seeks to curtail reasonably predictable conduct, not punish for prior acts.[54]

Edwards also made a claim that his due process rights were violated in that the detention hearing did not include all of the procedural requirements he claimed were guaranteed by the Constitution, namely confrontation, cross-examination, compulsory process, and findings established beyond a reasonable doubt. The court followed the earlier *Gerstein* decision on this point and held that procedural safeguards included in the District of Columbia statute "satisfy the minimum demands of procedural due process before a person may be detained pending trial on the grounds of dangerousness to the community".[55] The court recognized, as in *Gerstein*, that "the full panoply of adversary safeguards" was not constitutionally required in order to detain a dangerous suspect and that furthermore,

> the government has an obvious interest in not conducting a full-blown criminal proceeding twice, once for pretrial detention and a second time for the trial on the charges.[56]

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[52] D.C. Code 1973 Sec. 23-1322(a) 3.
[53] *United States* v. *Edwards*, *supra* note 22, at 19.
[54] Id. at 22-23.
[55] Id. at 26.
[56] Id. at 33.

Shortly after the *Edwards* decision, a federal court again considered pretrial detention but in the context of the constitutionality of a State law. In *Hunt* v. *Roth*,[57] the Eighth Circuit Court of Appeals held a provision of the Nebraska State Constitution unconstitutional that prohibited bail for all suspects charged with "sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great."[58]

The court based its holding on the ground that the Nebraska Constitution assumed all, sex offenders were dangerous or would not appear for trial and did not leave room for judicial discretion to make that determination:

> the fatal flaw in the Nebraska constitutional amendment is that the state has created *an irrebutable presumption* that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release.[59]

The court stated, however, that its decision in no way supported an absolute Eighth Amendment right to bail, nor did it prevent Congress from passing stautes allowing pretrial detention. *Hunt* instead held that such exceptions to release on bail not be blanket provisions; but permit some level of judicial discretion in the particular case on the issues of flight and danger to the community:

> We do not hold . . . that there is a constitutional right in every case to release on bail. As we have discussed, there exists a strong argument that bail may be properly denied without encroaching on constitutional concerns where a judicial officer weighs all the appropriate factors and makes a reasoned judgement that the defendant's past record demonstrates that bail will not reasonably assure his or her appearance or . . . that he or she, because of the overall record and circumstances, poses a threat to the community.[60]

The Supreme Court granted the petition for a writ of certiorari in the *Hunt* case. At the time of this report, the Court has not issued its ruling. Regardless of the outcome of that decision, the *Edwards* case remains the most comprehensive and reliable treatment of the due process issue to date. Whereas *Hunt* v. *Roth* concerned a state statute, *Edwards* involved a statute passed by the national legislature which specifically permitted pretrial detention on the basis of danger to the community and not, as in the Nebraska law, on the basis of a particular offense. Furthermore, the court in *Edwards* methodically examined the controversy surrounding pretrial detention statutes and dismissed any remaining doubt that such Congressional action would violate either a constitutional right to bail or the requirements of due process. Though *Hunt* found problems with the particular Nebraska provision, the

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[57] 648 F. 2d 1148 (1981).
[58] Nebraska Const. Art. I Sec. 9.
[59] *Supra* note 57 at 1164.
[60] Id.

decision upheld the general reasoning in *Edwards* that pretrial detention on the basis of dangerousness, when accompanied by safeguards ensuring the courts apply the detention standard reasonably and rationally, is not only a constitutionally valid procedure but a useful one in upholding the legitimate national interest in keeping our communities safe.

Assessing Risk to Community Safety

From the outset of laws governing bail, the difficult case to handle with appropriate legal standards has no doubt featured a suspect whose past criminal record indicates a strong likelihood that he will commit another crime if released pending trial. Traditionally the untrustworthy suspect was considered for bail on the basis of a classical surety system or statutory eligibility requirements that accounted, at least in part, for potential risks to community safety.

The classical capacity of a surety in assessing indirectly risks to the community has been underestimated in current practice. Little reliance is placed on a surety in modern bail practice because the nature and function of sureties have been altered from their classical role. Nonetheless the early English and early United States bail policies relied heavily on sureties to facilitate determinations of risk. This process was described in detail for the Subcommittee by Professor Daniel J. Freed of Yale Law School.[61] In their historical setting, the sureties were usually personally tied or related to the defendant. These sureties would appear before the court or magistrate as reputable citizens to testify about the reliability and good character of the defendant. If the court was satisfied with these showings, the sureties would customarily take a pledge, backed by their property, to produce the defendant in court for trial and supervise his conduct in the interim.

This process had several strengths: First, the court had some assurance that an individual with the capacity to control or influence the suspect's behavior would accept responsibility for his good conduct. This assurance was often supplied by members of the defendant's family. Second, the community whose security was in question was involved in making the release determination. If the defendant was unable to produce from the community sufficient willing sureties, he remained in custody. Third, the court had the opportunity to assess the merits of the sureties to ascertain if they could indeed keep their pledge. In this manner the court could question, via the qualifications and assertions of the sureties, the reliability of the defendant. An added, and unstated, advantage of this indirect assessment of the suspect's petition for release was that the court's findings avoided stigmatizing the defendant with a designation of dangerousness prior to adjudication.

Despite the merits of this classical surety system, Professor Freed documented that its virtues also proved to be its weakness. In the more transient frontier society of 19th century America, defendants often found it difficult to find a friendly surety who was

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[61] "Bail Reform," hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Congress, 1st session. (Sept. 17 and Oct 21, 1981) (testimony of Daniel J. Freed) (hereinafter cited as "Bail Reform Hearings").

willing to risk financial losses in the event the defendant was not as trustworthy as he seemed. Accordingly, bondsmen who accepted the risk for a fee, began to replace the classical surety. In those instances, the courts would refrain from inquiring into the relationship between the hired surety and the defendant. This change was symbolized by the 1911 Supreme Court decision of *Leary* v. *U.S.*[62] The case featured a claim by a hired surety against a defendant for enforcement of a contract provision idemnifying the surety against loss if the defendant did flee. The defense in the case raised the argument that the provision shold not be enforced because it undermined the surety's pledge to insure that the suspect would appear for trial. Nonetheless the Court enforced the contract. Although the Court settled the case primarily on contract principles with little regard for bail policy, the effect of the decision was to infer that the judiciary system did not care whether the bondsman forfeited his deposit or produced the suspect for trial. The compensated bondsman had replaced the classical surety whose personal realtionship obligated him to supervise the bailee.

Although courts continue to possess the authority to insist on reliable sureties as a condition of pretial release and occasionally use it,[63] the demographics of a modern society of strangers have dictated that the system is not often employed. In addition to the problem a defendant may have in finding sureties, the system may possess another flaw in the context of the crowded courts of current America. Invertigating the competence of sureties could involve a detailed inquiry into nebulous motives. These assessments could be time-consuming and based more on subjective intuition than on legal factors. On the other hand, questioning why a surety was willing to accept responsibility for a hardened criminal may reach very efficiently the most relevant considerations pertaining to pretrial detention. Regardless of the reasons for court reluctance to return to a classical surety system, it is clearly used in only unusual circumstances in current judicial administration.

The other traditional method of tacitly considering community security in bail policy was by statutes making some offenses ineligible or conditionally eligible for pretrail release. The Statute of Westminster is the earliest example of this approach. It specifically listed which crimes would and would not qualify for bail. These were the most violent offenses. As stated by one commentator:

> It is reasonable to conclude that anticipated danger to other persons or the community was a substantial motivating factor in legislative decisions to make bail unavailable to certain classes of dangerous offenders. Indeed in a case involving the attempted assassination of President Andrew Jackson by an allegedly insane man in 1835, an offense punishable at the time only as a misdemeanor, the court observed that "the discretion of the magistrate in taking bail in a criminal case, is to be guided (in part) by * * * the atrocity of the offense.[64]

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[62] 224 U.S. 567 (1911).
[63] *U.S.* v. *Field*, 109 F. 2d 554 (2d Cir. 1951).
[64] Mitchell, *supra* note 42 at 1225.

In the United States at the time that the Eighth Amendment was proposed to the First Congress, most states denied bail completely for any offense punishable by death. The Judiciary Act of 1789 was careful to make bail discretionary in capital cases. this afforded the court a broad authority to deny bail because most violent criminal offenses, including rape, arson, burglary, and robbery, were punishable by death according to state laws at that time.[65] Thus eligibility for bail was restricted for offenses involving a threat of serious bodily injury to the victim.

Over many decades, however, the number of crimes punishable by death was drastically reduced. Although this gradual limitation on the applicability of capital punishment was unrelated to pretrial release policy, its effect was to call into question the discretion of the courts to detain suspects based on the gravity of their alleged offense.

In 1972 the Supreme Court leaped beyond the gradual change in the states, which were limiting the circumstances in which capital punishment could be applied, in the case of *Furman* v. *Georgia*,[66] which in effect, abolished all death penalty statutes then in existence. This raised serious questions about bail laws referring to capital offenses. Several courts held that the abolition of capital punishment eliminated all "capital offenses" and meant that bail could no longer be denied for such offenses.[67] Although most cases adjudicating this question came to the opposite conclusion that capital offense classifications referred solely to categories of grave crimes that could be treated according to different procedures, including denial of bail,[68] the result in *Furman* still cast a legal cloud over bail laws referring to capital offenses.

The overall effect of the erosion of both the classical surety system and the ineligibility for bail based on grave offenses is a striking reduction in the discretion of the courts to handle the "hard" cases, the cases where the suspect's past criminal record indicates a strong likelihood that he may commit other crimes while free on bail. Without legal authority to deny bail on grounds of dangerousness, courts are in a dilemma. Many judges apparently resolve this difficulty by setting a financial condition of release that exceeds the defendant's ability to pay. The Attorney General's Task Force on Violent Crime recognized this subrosa form of pretrial detention with the terse observation that "there is a widespread practice of detaining particularly dangerous defendants by the setting of high money bonds to assure appearance."[69] In testimony before the Senate Judiciary Committee a few years after the enactment of the 1966 Act, former Judge Tim Murphy of the District of Columbia Court of General Sessions explained the reasons judges may resort to high money bail:

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[65] Id. at 1226–7.

[66] 408 U.S. 238 (1972).

[67] *In re Tarr*, 508 P.2d 728 (1973); *State* v. *Johnson*, 294 A. 2d 245 (1972).

[68] *Ex parte Bynum*, 294 Ala. 78, 312 So. 2d 52 (1975); *People* v. *Obie*, 116 Cal. Reptr. 283 (1974); *People* v. *Anderson*, 493 P. 2d 880 (1972); *Dunbar* v. *District Court*, 500 P. 2d 358 (1972); *Donaldson* v. *Sack*, 265 So. 2d 499 (1972); *Martley* v. *State*, 519 P. 2d 544, cert. denied, 419 U.S. 863 (1974); *United States* v. *Kennedy*, 618 F. 2d 557 (9th Circ. 1980); *Kennedy* v. *Walters*, 366 F. Supp. 600 (1973).

[69] Attorney General's Task Force on Violent Crime, Final Report, at 51, Aug. 17, 1981.

> An unreasonable law has the ultimate effect of forcing those who administer it to ignore it, calloused of the consequences, or else to make extreme rationalization in circumventing it; this applies to judges. You cannot expect judges to follow the letter of a law that requires them to turn many dangerous criminals loose day after day.[70]

The "Interim Report of the State of New York Temporary Commission on the Revision of the Penal and Criminal Code" commented on this situation as follows:

> There is little doubt that the average judge will, regardless of the reasons given by him, deny bail to a defendant charged with forcible rape and have an unsavory record of sex crimes, no matter how certain he may be that the defendant will appear in court when required; nor is there any doubt that such practice . . . has the approval of the general public.[71]

The ultimate irony of this situation is that the Bail Reform Act of 1966, enacted to protect individuals against detention "because of their financial inability to post bail,"[72] placed courts in the posture of regularly setting bail beyond a defendant's financial ability. By forbidding any weighing of the suspect's dangerousness, the statute, in continuing to rely on the category of "capital" offenses to describe the gravest crimes, despite the limitation over time of that category to virtually the sole offense of first degree murder, and in conjunction with the demographical factors undermining the classical surety system, had the unintended effect of making the detention of defendants on high money bail a "widespread practice."

To remedy this situation, the Chief Justice has stressed the need to provide for greater flexibility in our bail laws to permit judges to give adequate consideration to the issue of threats to community safety.[73] His recommendation is joined by the American Bar Association Standards Relating to the Administration of Justice,[74] the National Conference of Commissions on Uniform State Laws,[75] and the National Association of District Attorneys.[76]

Statutory provisions granting courts the discretion to weigh risk to community safety as a factor in pretrial release decisions, however, have been vaguely criticized as requiring judges to predict future behavior. Although this approach to the problem would involve the courts in weighing as a factor the potential for future behavior based on the defendant's past record, this is not an unusual burden for the courts. The Bail Reform Act itself allows a judge to examine the suspect's proclivity for future violence when determining bail in a capital case. Moreover, the same bail law requires the

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[70] Hearings on amendments to the Bail Reform Act before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Congress, 1st session, at 220–221 (1969).

[71] Interim report of the State of New York Temporary Commission on Revision of the Penal and Criminal Code, part A, section B, 1969.

[72] Bail Reform Act of 1966, 18 U.S.C. 3146, section 2 (findings).

[73] Chief Justice Warren E. Burger's annual address to the American Bar Association, February 1981.

[74] American Bar Association Standards on Pretrial Release, 10–5.2 (1978).

[75] National Conference of Commissioners on Uniform State Laws, Uniform Rule of Criminal Procedure 341 (1974).

[76] Bail reform hearings, *supra* note 53 (testimony of James C. Anders).

courts to predict the potential for flight by the defendant in all instances of pretrial release. When balancing protection of the public against the first amendment right to hold a mass demonstration, the courts also must weigh the potential for violence. Thus, projecting potentialities and tendencies in the interest of public safety is not beyond the capability of the courts. The 1966 report of the President's Commission on Crime in the District of Columbia reinforced this principle:

> After considering the opposing arguments, the majority concludes that the courts are presently capable of identifying those defendants who pose so great a threat to the community that they should not be released, and that a constitutionally sound statute authorizing detention in certain cases can be drawn.[77]

When the court makes a determination about the likelihood of dangerous conduct between arrest and trial, it is not idly gazing into a nonexistent crystal ball, but instead examining a reliable record of past conduct. The current bail act, in effect, blacks out that aspect of the record most relevant to public safety, dangerousness of the defendant, and leaves the court to make its projection based solely on the risk that the suspect will not appear for trial. The current law does not prevent courts from predicting but only withdraws that part of the record that would make the forecast reliable.

Overview of Studies on Bail Policy

In 1927 Arthur L. Beeley published the first major empirical study of pretrial release programs, "The Bail System in Chicago." He concluded that:

> the present system, in too many ways, neither guarantees security to society, nor safeguards the rights of the accused. The system is too lax with those whom it should be stringent, and stringent with those whom it could be less severe.

In one respect, the system has improved since Beeley's study. The improvement, however, has focused on making the system less severe and acknowledging the rights of the accused. Guaranteeing the security of society and improving the lax aspects of the system have received little attention.

Violent crime has steadily increased in the past few decades. Many of the following studies reveal that a significant amount of that crime is committed by persons on some sort of court-ordered release (bail, probation, parole, etc.).

There has been much concern expressed about the amount of crime committed by persons on pretrial release programs. Just recently the Attorney General's Task Force on Violent Crime (1981) called for reform and recommended that judges be given the right to detain persons they consider dangerous to the community. This section of this report outlines some of the more important bail

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[77] President's Commission on Crime in the District of Columbia, Report 596 (1966).

system studies since the mid 1960's and their findings regarding crime committed by persons on bail.

I. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, U.S. GOVERNMENT PRINTING OFFICE, REPORT 596 (1966).

The study included an examination of release and recidivist rates in the District of Columbia between January 1, 1963 and October 8, 1965. Of 2,776 felony defendants released on bail during that period, 207 or 7.5 percent were subsequently rearrested on one or more felony charges. Other findings of the Commission included the following:

(1) more than 80 percent of the recidivists committed crimes as serious or more serious than the original offense.

(2) 88 percent of the 207 recidivists had prior adult arrest or conviction records in the District of Columbia.

(3) courts definitely consider dangerousness in setting bail: the average bond more than doubled when the defendant appeared a second time for an offense committed while on bail. Furthermore, the average amount of bail for dangerous crimes such as first degree murder, rape, robbery and assault was considerable higher than for other crimes.

(4) Little correlation exists between a suspect's likelihood to flee in order to avoid prosecution and the likelihood he will commit other crimes while free on bail. Only seven of the 207 recidivists or 3.4 percent forfeited bond in connection with their original offense. In comparison, the average forfeiture rate among all of those released in the Commission study was 5.7 percent.

This last finding is rather significant. A dangerous person is not necessarily one who will be likely to flee. Thus current bail procedures which allow for restrictions on those likely to flee are definitely not sufficient to cover dangerous criminals. Rather, some new standard such as a direct consideration of dangerousness must be permitted if the recidivist rate is to be decreased.

In addition to findings regarding recidivist rates, the Commission report put forth several recommendations to curb crime on bail. Among the proposals, the Commission recommended the following:

(1) Amendment of the Bail Reform Act of 1966 to allow courts to consider the defendant's potential danger to the community as well as the likelihood of flight in setting conditions of release.

(2) Additional penalties to persons committing crimes while on bail including the doubling of maximum sentences allowable.

(3) Expedited trials to allow less time for those released on bail to commit additional crimes.

(4) Revocation of pretrial release for those accused of committing additional crimes while on bail when there is probable cause that the suspects are indeed guilty of these crimes.

(5) Outright detention in the interest of public safety if likely that a suspect will engage in criminal conduct if released.

II. REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967).

The study relied on the statistics of the 1966 Commission report and the finding of a 7.5-percent recidivist rate. In its findings on bail procedure and law enforcement, the 1967 Commission report made the following observation concerning pretrial detention of dangerous suspects:

> The bail system recognizes ensuring appearance at trial as the only valid purpose for imposing bail, but society also has an important interest in securing protection from dangerous offenders who may commit crimes if released before trial. In practice, the result has been that judges have frequently gone beyond the sole recognized purpose of bail and have set high money bail to prevent release of an arrested person where danger to the community rather than flight is the principal concern. (Hearings before the Senate Judiciary Subcommittee on the Constitution regarding Amendments to the Bail Reform Act of 1966. (91st Congress, 1st session, p. 590–01).

III. SURVEY OF THE APPARENT ABUSE OF THE BAIL RELEASE SYSTEM—A STUDY PREPARED FOR THE METROPOLITAN POLICE DEPARTMENT, WASHINGTON, D.C., BY ROBERT REIVER (JULY 24, 1968).

The study concerned defendants initially arrested for the charge of armed robbery between July 1, 1966 and June 30, 1967. Out of 130 such susepcts arrested during this period, 45, or 34.6 percent, were subsequently indicted for at least one additional felony while on bond. These 45 defendants had a combined total of 76 additional indictments after their release or an average of 1.7 crimes each.

Even ardent critics of the Police Study's procedures admit that the recidivist rate among suspects arrested for armed robbery during the given period could have been as high as 31.6 percent. (Norman Lefstein, "Analysis of the Metropolitan Police Study Concerning Crime on Bail," Senate Hearings on Amendments to 1966 Bail Reform Act, 91st Cong. 1st Session, p. 676).

IV. STATEMENT OF ATTORNEY GENERAL JOHN MITCHELL BEFORE THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, OCTOBER 21, 1969 AT 2. BASED ON A STUDY CONDUCTED BY THE ATTORNEY GENERAL'S OFFICE IN THE DISTRICT OF COLUMBIA (1968).

This study showed that of 557 defendants indicted in 1968 for robbery, 345 were released and 242 of the 345, or 70 percent of the released defendants, were consequently rearrested while on bail. The Hart Committee (cited hereafter) reviewed the Attorney General's study and came up with a 63.7 percent recidivist rate "thus basically confirming the USAG's office study of robbery defendants" (Hart Committee 1969 Report, at 20–21).

V. THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA (THE HART COMMITTEE) (1968–1969).

The study and its update considered bail procedures during the first half of 1967. Of 671 persons released on bail pending trial during this period, 59 or 9 percent were reindicted for offenses allegedly committed within six months of pretrial release. The study recognized that it could not count unreported or unresolved crimes whch may have been committed by people on bail. The study also intentionally excluded less serious crimes in the recidivist rate. Based on these limitations the Committee concluded that its 9 percent recidivist rate "measures only the most serious and possibly the lowest incidence of crime on bail" (1969 Report, p. 20.).

VI. THE NATIONAL BUREAU OF STANDARDS, TECHNICAL NOTE 535, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRETRIAL RELEASE OF DEFENDANTS: PILOT STUDY (AUGUST 1970).

The study covered four randomly selected weeks in 1968. During these four weeks, a total of 654 suspects were charged with felonies or misdemeanors. Of these 654 arrested, 426 were released prior to trial and of these, 47 or 11 percent were subsequently rearrested on another charge. The study found that the recidivist rate was significantly higher for those accused of "crimes of violence" (17 percent) and those accused of "dangerous crimes" (25 percent). The study concluded that those defendants in the dangerous crimes category "can be expected to produce a much higher recidivist rate—about 3 to 4 times as high as for those in the nondangerous category" (p. 136–37).

The Bureau of Standards study further recognized that the 11 percent recidivist rate they calcuated might have been lower than the actual rate. As Fredrick Hess in commenting on the Bureau of Standards study points out:

> There is a plethora of crimes that go unsolved and others that go unreported. Surely some of these crimes are committed by those on pretrial release, and, as the Study suggested, the unsolved offense alone might raise the recidivist rate to nearly 37 percent. How high it might reach if the unreported crimes as well as those committed in other jurisdictions, could be included is a matter of conjecture. ("Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Stem in Bail Reform". 37 Brooklyn Law Review, p. 277.)

VII. NOTE PREVENTIVE DETENTION: AN EMPIRICAL ANALYSIS, HARVARD CIVIL RIGHTS—CIVIL LIBERTIES LAW REVIEW, V. 6 (1971).

This study examined rearrest data on 427 persons freed pending trial in Boston in 1968. 62 of the 427 releases (14.5 percent) were rearrested for crimes committed on bail and 41 of the 427 (9.6 percent) were convicted of subsequent offenses. The study also indicated that the length of time a defendant was on pretrial release was a significant factor in commission of pretrial crime. 29 of the 41

bail crimes and 15 of 19 serious crimes were committed after the 60th day of release.

VIII. BERNARD WICE, BAIL AND ITS REFORM: A NATIONAL SURVEY, U.S. DEPARTMENT OF JUSTICE LAW ENFORCEMENT ADMINISTRATION NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE (1973).

The study included two parts, the first of which looked at several major metropolitan areas around the United States. Among the cities keeping statistics on recidivist crime, the study found an average crime on bail rate of 11 percent. The study made the following recommendation regarding the problem of recidivist crime:

> Defendants on pretrial release could be subjected to adequate supervision, either through their lawyers or a court agency. This could be coupled with preventive detention type qualifications by which to identify the relatively bad risks in order to impose on them more stringent conditions of release such as more frequent reporting dates. (p. 26).

The second part of the study was a survey of 72 cities and towns around the nation. While the recidivist rate was only 7 percent as a result of the large number of small towns included, the study found that 50 percent of the localities were experiencing rising recidivist rates.

IX. NATIONAL BAIL SURVEY, WICE, PAUL B. FREEDOM FOR SALE: A NATIONAL STUDY OF PRETRIAL RELEASE, LEXINGTON, MASSACHUSETTS, D. C. HEATH (1974).

A 72-city survey estimated the country's rate of rearrest on bail to be approximately 7 percent. This is 4 percent lower than the National Bureau of Standards Study; however, the author points out that at least 30 cities had populations under 200,000. It is therefore reasonable to expect that cities with lower populations will have lower rearrest statistics. A further breakdown showed that 45 cities estimated a recidivist rate of under 10 percent while 15 cities had a 10–19 percent rate of recidivism for individuals free on bail.

X. INSTITUTE FOR LAW AND SOCIAL RESEARCH, WASHINGTON, D.C. (1974).

This study focused on the question of what percentage of all crime committed in the District of Columbia is committed by persons on some form of court-ordered release. Of all persons arrested for felonies, the following proportions were free on some form of conditional release (bail, probation, parole):

	Percent
Murder	28
Rape	19
Robbery	31
Burglary	32
Assault	11
Total all felonies	26

XI. D.C. BAIL AGENCY AND THE STATISTICAL CENTER OF THE D.C. OFFICE OF CRIMINAL JUSTICE PLANS AND ANALYSIS (1975).

A study in 1975 indicated that 33 percent of all persons charged with a crime in the District of Columbia were on some type of release from the criminal justice system: 15 percent were on pretrial release from another case, 13 percent were free under some form of post-conviction supervision such as parole, probation or work release. Another 5 percent were on both pretrial release and post-conviction supervision.

XII. CHARLOTTE, N.C., STUDY: CLARKE, STEVEN H., JEAN L. FREEMAN, AND GARY G. KOCH, THE EFFECTIVENESS OF BAIL SYSTEMS: AN ANALYSIS OF FAILURE TO APPEAR IN COURT AND REARREST WHILE ON BAIL. INSTITUTE OF GOVERNMENT, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (1976).

Of 861 randomly chosen defendants, excluding those charged with public drunkenness or traffic violations, 756 received pretrial release, 70, or 9.3 percent of the defendants failed to appear and 75, or 9.9 percent were rearrested for pretrial crime. The study found that the length of pretrial freedom had a significant effect on chances of rearrest. The chance of avoiding rearrest dropped 5 percent every two weeks the defendant remained at liberty. For a defendant with a previous record of two or more prior arrests the changes of rearrest before trial was twice as great as for those with one or no previous arrests.

XIII. PRETRIAL RELEASE PROGRAMS, WAYNE H. THOMAS. NATIONAL EVAUATION PROGRAM PHASE I SUMMARY REPORT, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE (APRIL 1977).

The study was based on questionnaires mailed to 115 pretrial release programs around the country in the summer of 1975. The major finding applicable to crime on bail was in response to a question about recidivist rates. Among the programs surveyed, 21 percent of nonfinancial release programs and 75 percent of financial release programs reported recidivist rates of above 10 percent.

XIV. NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, UNITED STATES DEPARTMENT OF JUSTICE, "INSTEAD OF JAIL: PRE AND POST-TRIAL ALTERNATIVES TO JAIL INCARCERATION" ALTERNATIVES TO PRETRIAL DETENTION (1977).

A report that looked at five areas in the country indicated that in the city of Washington, D.C. the percent rearrested while on bail as compared to all granted conditional release was:

Prior record:	
Felons	26.3
Felons and misdemeanants	12.1
No prior record:	
Felons	17.0
Felons and misdemeanants	11.7

In Memphis the study broke down crime against persons and crime against property. In felony cases against persons, 11 percent were rearrested, while 23 percent were rearrested in crimes against property.

XV. PRETRIAL RELEASE AND MISCONDUCT IN THE DISTRICT OF COLUMBIA. JEFFERY ROTH AND PAUL WICE. PROMIS RESEARCH PROJECTS PUBLICATIONS 16 (OCTOBER 12, 1978).

The study was based on data concerning all felony and misdemeanor cases arraigned in District of Columbia Superior Court during the year 1974. Of the nearly 11,000 cases included in the study, approximately 40 percent involved felony charges; the remainder were serious misdemeanors.

The study made the following important findings concerning dangerous suspects and crime on bail:

(1) Among felony defendants released prior to trial during 1974, 13 percent were rearrested before disposition of their cases.

(2) High bond does not discourage pretrial crime. Indeed, there is no reason for such to be the case as bond is not forfeited upon rearrest.

(3) When setting conditions of release for suspects not detained due to dangerousness, judges often consider the nature of the crime and the suspect's background even though appearance at trial is supposed to be the only factor considered. For instance, the study noted that:

> Even though D.C. laws instruct judges to release on personal recognizance any defendant who is likely to appear in court, it nevertheless seems that the seriousness of the charge against the defendant has some impact upon the judges pretrial release decision. (p. III-7)

Furthermore the study found that:

> Crime types that are commonly thought to suggest a potential for pretrial misconduct, such as homicide, assault, or bail violation, do result in more severe release conditions. Defendants in these categories were more likely to face financial conditions, were more likely to be placed under the supervision of a bondsman, and were required to pledge higher bonds than were other defendants. (p. III-24)

XVI. D.C. BAIL AGENCY. "HOW DOES PRETRIAL SUPERVISION AFFECT PRETRIAL PERFORMANCE?," (1978).

This study indicated that 65 percent of those released after an arrest for auto theft were taken into custody for another auto theft while out on bail.

XVII. THE FEDERAL BAIL PROCESS FOSTERS INEQUITIES, REPORT TO CONGRESS BY THE COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE (OCTOBER 17, 1978).

The Comptroller's study involved eight federal district court jurisdictions. The study used a sample of 1,555 cases within these ju-

risdictions. The primary finding was that there exists a great inconsistency in the application of federal bail law. Suspects accused of very similar offenses were treated differently in the various jurisdictions.

Among the recommendations the study made to enable the federal judiciary to make bail decisions more equitable and reduce the differences in conditions of release was the following:

CLARIFYING THE LEGITIMATE PURPOSES OF BAIL

> Some judicial officers believe that the only purpose of bail is to reasonably assure a defendant's appearance. Others believe bail can be used to prevent release of defendants who might commit a new crime or can be used to induce defendant's to act as informants by agreeing to release them. These differing interpretations on the purposes of bail result in defending being treated inconsistently. (p. i.)

This study points to the severe problems associated with the lack of a clear, orderly, and uniform federal bail system in this country. What is needed, then, is not only legislation that will add dangerousness to the present factors permissible for consideration in determining pretrial release conditions, but a bill clarifying the entire general procedure so that judges know their responsibilities and can act efficiently and consistently.

XVIII. "STATISTICAL RESULTS OF THE BAIL PROCESS IN EIGHT FEDERAL DISTRICT COURTS," GENERAL ACCOUNTING OFFICE GGD-78-106 (NOVEMBER 1, 1978).

In a statistical supplement to the preceding Comptroller General's Report to Congress, GAO found that of crimes committed by persons on bail, by a 3 to 1 margin, there were more felonies than misdemeanors committed.

XIX. PRETRIAL RELEASE: A NATIONAL EVALUATION OF PRACTICES AND OUTCOMES, THE LAZAR INSTITUTE, WASHINGTON, D.C. (1981).

The study analyzed data on approximately 6000 defendants from 12 jurisdictions around the country during the late 1970's. Of the total of arrested defendants, 85 percent were released; 16 percent of those released were arrested on other charges while on bail. The study also made the following pertinent findings:

(1) There is a marked trend toward increasing release rates.

(2) Most detained people are held for failure to pay bond—not ordered detention.

(3) Of those detained, 43 percent had committed dangerous offenses (homicide, forcible rape, robbery, assault, burglary, and theft).

(4) One third of those suspects not appearing for trial were subsequently brought back on other charges.

(5) Overall, 16 percent of released defendants were arrested pending trial. 30 percent of these were arrested more than once and the average number of arrests before trial was 1.4.

The foregoing studies are only a few of the many that have been conducted in the past few decades. Though the studies all differ in terms of their procedures, particulars of their statistics, and vantage points, they all reach some common conclusions regarding crime on bail.

The rate of crime on bail, measured for some crimes as high as 34–70 percent, is a problem of increasing concern. According to eight of these studies, the rate of crime on bail lies somewhere between 7–20 percent. The true rate, however, is probably much higher in light of statistics demonstrating that over 50 percent of all crimes go unreported and fewer than 25 percent of reported crimes lead to an arrest.

Several studies indicated that the length of pretrial release plays a significant role in determining whether or not a subsequent crime will be committed. Moreover those with prior records are more prone to commit crime while on pretrial release. In addition, the GAO Study indicated that persons on bail tended to commit more felonies than misdemeanors.

A study in Memphis found that 23 percent of bail crime is committed against property, rather than against persons. Two studies bear this out. In Washington, D.C. it was found that 65 percent of auto theft defendants on pretrial release were rearrested for another auto theft. An Attorney General's report on crime in the District of Columbia showed that 70 percent of release robbery defendants were rearrested for another crime.

The INSLAW study in 1974 indicates how bail reform might affect the crime rate in some cities. Of all persons that committed felonies in Washington, D.C., 26 percent were on some form of release program. Of all persons arrested for murder, 28 percent had been released by judicial processes.

These studies indicate the need for change in the standard for pretrial release and detention so that judges can openly consider the possible threat a suspect poses to community safety. Crimes committed by persons already apprehended for earlier offenses can be prevented.

Section-by-Section Analysis

SECTION 3141. RELEASE AND DETENTION AUTHORITY GENERALLY

This section specifies which judges have the authority to order the release [78] or detention of persons pursuant to this chapter. Subsection (a) deals with release and detention authority pending trial, and provides that a judicial officer who is authorized to order the arrest of a person shall order that an arrested person brought before him be released pursuant to 18 U.S.C. 3041 or detained, pending judicial proceedings, pursuant to this chapter. The judicial officers authorized to arrest a person under 18 U.S.C. 3041 include any justice or judge of the United States, a United States magistrate, and those State judicial officers who are authorized to arrest and commit offenders, and would also include United States magis-

[78] Instead of using the term "bail", this provision and other provisions in this chapter use the term "release" in order to distinguish between money bond (i.e., "bail") and conditional release (often referred to as "release on bail").

trates. Similar authority is set out in 18 U.S.C. 3141 under current law, although that portion of the present 18 U.S.C. 3141 which limits the authority to set bail in capital cases to judges of courts of the United States having original jurisdiction over the case has not been carried forward.

Release and detention authority pending sentence and appeal, which is addressed in subsection (b), is limited to a judge of a court having original jurisdiction over the offense, or a judge of a federal appellate court. Although is would be inappropriate for a State judge or a magistrate to make a release determination after a federal conviction, the current form of 18 U.S.C. 3141 makes no distinction between release authority pending trial and that after conviction, despite the fact that Rule 9(b) of the Federal Rules of Appellate Procedure requires that an application for release pending appeal be made in the first instance before the trial court.[79] Section 3141(b) resolves this ambiguity.

SECTION 3142. RELEASE OR DETENTION OF A DEFENDANT PENDING TRAIL

This section makes several substantive changes in the basic provisions of the Bail Reform Act of 1966. That Act, in 18 U.S.C. 3146, adopted the concept that in non-capital cases a person is to be ordered released pretrial under those minimal conditions reasonably required to assure his presence at trial. Danger to the community and the protection of society are not to be considered as release factors under the current law.

Considerable criticism has been leveled at the Bail Reform Act in the years since its enactment because of its failure to recognize the problem of crimes committed by those on pretrial release.[80] In recent years, both the President [81] and the Chief Justice [82] have urged amendment of federal bail laws to address this deficiency. In its final report, the Attorney General's Task Force on Violent Crime summarized what is increasingly becoming the prevalent assessment of the Bail Reform Act:

> The primary purpose of the Act was to deemphasize the use of money bonds in the federal courts, a practice which was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants, and to provide a range of alternative forms of release. These goals of the Act—cutting back on the excessive use of money bonds and providing for flexibility in setting conditions of release appropriate to the characteristics of individual defendants—are ones which are worthy of support. However,

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[79] The advisory notes to rule 9(b) of the Federal Rules of Appellate Procedure state that the "[n]otwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. 3148 and FRCrP 38(c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court."

[80] Criticism of the Bail Reform Act is set forth in H.R. Rep. No. 91-907, 91st Congress, 2d session, 87-104 (1970). See also generally materials set forth in "Amendments to the Bail Reform Act of 1966," Hearings, *supra* note 77: "Preventive Detention," hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 91st Congress, 2d session (1970); Bail Reform Hearings, *supra* note 61.

[81] Address of President Reagan to the International Association of Chiefs of Police, Sept. 28, 1981.

[82] Address of Chief Justice Burger to the American Bar Association. Feb. 8, 1981.

> 15 years of experience with the Act have demonstrated that, in some respects, it does not provide for appropriate release decisions. Increasingly, the Act has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community.[83]

The constraints of the Bail Reform Act fail to grant the courts the authority to impose conditions of release geared toward assuring community safety, or the authority to deny release to those defendants who pose an especially grave risk to the safety of the community. If a court believes that a defendant poses such a danger, it faces a dilemma—either it can release the defendant prior to trail despite these fears, or it can find a reason, such as risk of flight, to detain the defendant (usually by imposing high money bond). In the Committee's view, it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.

The concept of permitting an assessment of a defendant's dangerousness in the pretrial release decision has been widely supported, and, as previously noted, has been specifically endorsed by such groups as the American Bar Association,[84] the National Conference of Commissioners on Uniform State Laws,[85] the National District Attorneys Association,[86] and the National Association of Pretrial Service Agencies.[87] In addition, the laws of several States recognize the validity of weighing the issue of the risk a released defendant may pose to community safety,[88] and the release provisions of District of Columbia Code, passed by the Congress in 1970, specifically recognize that defendant dangerousness is an appropriate consideration in setting conditions of pretrial release and may also serve as a basis for pretrial detention.[89]

This broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release. In a recent study of release practices in eight jurisdictions, approximately one out of every six defendants in the sample studied were rearrested during the pretrial period—one-third of these defendants were rearrested more than once, and some were rearrested as many as four times.[90] Similar levels of pretrial criminal-

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[83] Final Report of the Attorney General's Task Force on Violent Crime, Aug. 17, 1981, at 50-51. With some modification, all of the recommendations of the Attorney General's Task Force with respect to amendment of the Bail Reform Act are adopted in this chapter.

[84] American Bar Association, "Standards Relating to the Administration of Criminal Justice: Pretrial Release" (1978), Standards 10-5.2, 10-5.8, and 10-5.9.

[85] National Conference of Commissioners on Uniform State Laws, "Uniform Rules of Criminal Procedure" (1974), Rule 341.

[86] National District Attorneys Association, "National Prosecution Standards: Pretrial Release" (1977), Standard 10.8.

[87] National Association of Pretrial Service Agencies, "Performance Standards and Goals for Pretrial Release and Diversion," Standard VII.

[88] "Bail Reform Hearings," *supra* note 61 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[89] D.C. Code, sec. 23-1321 et seq.

[90] Lazar Institute, "Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact" 48 (Washington, D.C., August 1981).

ity were reported in a study of release practices in the District of Columbia, where thirteen percent of all felony defendants released were rearrested. Among the defendants released on surety bond, which under the District of Columbia Code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial rearrest occurred at the alarming rate of twenty-five percent.[91] The disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial.[92]

In facing the problem of how to change current bail laws to provide appropriate authority to deal with dangerous defendants seeking release, the Committee concluded that while such measures as permitting consideration of community safety in setting release conditions and providing for revocation of release upon the commission of a crime during the pretrial period may serve to reduce the rate of pretrial recidivism, and that these measures therefore should be incorporated in this bill, there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.

The decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. However, not only the interests of the defendant, but also important societal interests are at issue in the pretrial release decision. Where there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate. This rationale—that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interests—has been used to support court decisions which, despite the absence of any statutory provision for pretrial detention, have recognized the implicit authority of the courts to deny release to defendants who have threatened jurors or witnesses,[93] or who pose significant risks of flight.[94] In these cases, the societal interest implicated was the need to protect the integrity of the judicial process. The need to protect the community from demonstrably dangerous defendants is a similarly compelling basis for ordering detention prior to trial.

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[91] Institute for Law and Social Research, "Pretrial Release and Misconduct in the District of Columbia" 41 (April 1980) (hereinafter cited as the INSLAW Study).

[92] Consideration of defendant dangerousness in the pretrial release decision is currently permitted only in capital cases and may serve as the basis for denial of release, 18 U.S.C. 3148. The special conditions for release in capital cases under 18 U.S.C. 3148 were recently held in *United States* v. *Kennedy*, 618 F. 2d 557 (9th Cir. 1980), to be derived from the particularly dangerous nature of such offenses and not the nature of the penalty, so that consideration of danger continued to be appropriate irrespective of the fact that the proscribed death penalty could not be imposed in light of *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[93] See *United States* v. *Wind*, 527 F. 2d 672 (6th Cir. 1975); *United States* v. *Gilbert*, 425 F. 2d 3 (D.C. Cir. 1969).

[94] *United States* v. *Abrahams*, 575 F. 2d 3 (1st Cir.), cert. denied, 439 U.S. 821 (1978).

The concept of pretrial detention has been the subject of extensive debate.[95] It should be noted that the legislative history of the Bail Reform Act indicates that although the issue of pretrial detention was then recognized as "intimately related to the bail reform problem" the need to reform existing bail procedures was viewed as "so pressing that such reform should not be delayed with the hope of enacting more comprehensive legislation that might deal also with the preventive detention problem," and as a consequence, the issue of pretrial detention was reserved for "additional study."[96] Four years after the passage of the Bail Reform Act, the Congress did pass a preventive detention provision in the context of the District of Columbia Court Reform and Criminal Procedure Act of 1970; action to include a similar provision of general applicability in federal criminal cases is overdue.

The Committee has given thorough consideration to the issues which have arisen during the lengthy debate over pretrial detention.[97] In particular, this consideration has focused on three questions: First, whether pretrial detention is constitutionally permissible; second, whether a preventive detention statute that is appropriately narrow in scope, and that provides necessarily stringent safeguards to protect the rights of defendants, will be sufficiently workable, as a practical matter, that it will be utilized to any significant degree; and third, whether the premise of a pretrial detention statute—that judges can predict with an acceptable degree of accuracy which defendants are likely to commit further crimes if released—is a reasonable one.

With respect to the first two questions, experience with the preventive detention provision of the District of Columbia Code[98] has been a useful reference. Although this statute was enacted in 1970, its constitutionality has been squarely addressed only recently. In *United States* v. *Edwards*,[99] the District of Columbia Court of Appeals *en banc* upheld the constitutionality of the statute. While the opinion of the court addressed a variety of constitutional issues, the decision focused on, and ultimately rejected, the two most commonly raised arguments that pretrial detention is unconstitutional: That the Eight Amendment's prohibition on excessive bail impliedly guarantees an absolute right to release pending trial, and that pretrial detention is violative of the Due Process Clause of the Fifth Amendment in that it permits punishment of a defendant prior to an adjudication of guilt. In its review of the Eighth Amendment issue, the court exhaustively examined both the origins of the excessive bail clause and case law interpreting it, and concluded that the purpose of the Amendment was to limit the discretion of the judiciary in setting money bail in individual cases, and not to limit the power of the Congress to deny release for certain crimes or certain offenders.[100] With respect to the Due Proc-

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[95] See materials in Senate 1970 Hearings on Preventive Detention, *supra* note 72; Hess, "Pretrial Detention and the 1970 District of Columbia Crime Act: The Next Step in Bail Reform," 37 Brooklyn Law Review 277 (1971); Meyer, "Constitutionality of Pretrial Detention," 60 Geo. L. J. 1140 (1972); Silbert and Ruuh, "Criminal Laws and Procedures: The District of Columbia Court Reform and Criminal Procedures Act of 1970," 20 Am. U. L. Rev. 252 (1970–71).

[96] S. Rept. 89–750, 89th Congress, 1st session 5 (1965).

[97] See materials in "Bail Reform Hearings," *supra* note 61.

[98] D.C. Code, sec. 23–1322.

[99] *Supra* note 22.

[100] *Id.* at 6–19 (slip op.).

ess issue, the court concluded, correctly in the view of the Committee, that pretrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence, but rather that it is designed "to curtail reasonably predictable conduct, not to punish for prior acts," and thus, under the Supreme Court's decision in *Bell* v. *Wolfish*, is a constitutionally permissible regulatory, rather than a penal, sanction.[101]

Based on its own constitutional analysis and its review of the *Edwards* decision as covered in earlier sections of this report, the Committee is satisfied that pretrial detention is not per se unconstitutional. However, the Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

Whether a pretrial detention statute would in practice be of the utility argued by its proponents was an issue which had previously concerned the Committee in light of the fact that, in the past, the pretrial detention provision of the District of Columbia Code was rarely used.[102] However, in recent years, the use of this provision has been significantly expanded, in part because its constitutionality has been resolved by the local courts and in part because prosecutors are learning how to use it more efficiently and effectively.[103]

An additional concern of the Committee, in assessing the practical utility of a pretrial detention statute, was the argument that stringent financial conditions of release, believed by many now to be used indirectly to detain dangerous defendants, would be used to avoid the limitations and procedural requirements that would necessarily be incorporated in a provision that direclty authorized pretrial detention.[104] While the Committee recognizes that financial conditions could still be used in this manner to achieve detention, it concluded that, by providing both a workable pretrial detention statute and restrictions on the use of financial conditions of release, this problem could be effectively addressed. This issue is discussed in further detail below.

The question whether future criminality can be predicted, an assumption implicit in permitting pretrial detention based on perceived defendant dangerousness, is one which neither the experi-

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[101] *Id.* at 20–25 (slip op.). In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court rejected the contention of persons detained prior to trial that certain conditions of their confinement constituted punishment that was impermissible under the Fourth Amendment and violative of the presumption of innocence, two arguments parallel to those frequently raised in opposition to pretrial detention generally. The petitioners did not attack the constitutionality of the initial decision to detain and the Court specifically reserved any determination of this issue. 441 U.S. at 534 and n. 15.

[102] S. Rept. 96–553, 96th Congress, 2d session, 1073 (1980).

[103] Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, United States House of Representatives, 97th Congress, 1st session, July 29, 1981 (testimony of Charles Ruff, United States Attorney for the District of Columbia).

[104] Use of high money bond to detain defendants has been cited as the reason for the infrequent use of the D.C. Code pretrial detention statute over much of its history. INSLAW study, *supra* note 9 at 45.

ence under the District of Columbia detention statute nor empirical analysis can conclusively answer. If a defendant is detained, he is logically precluded from engaging in criminal activity, and thus the correctness of the detention decision cannot be factually determined. However, the presence of certain combinations of offense and offender characteristics, such as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addiction, have been shown in studies to have a strong positive relationship to predicting the probability that a defendant will commit a new offense while on release.[105] While predictions which attempt to identify those defendants who will pose a significant danger to the safety of others if released are not infallible, the Committee believes that judges can, by considering factors such as those noted above, make such predictions with an acceptable level of accuracy.

Predictions of future behavior with respect to the isue of appearance are already required in all release decisions under the Bail Reform Act, yet one study on pretrial release suggests that pretrial rearrest may be susceptible to more accurate prediction than nonappearance.[106] Furthermore, as noted in testimony before the Committee,[107] current law authorizes judges to detain defendants in capital cases and in postconviction situations based on predictions of future misconduct.[108] Similarly, a federal magistrate may detain a juvenile under 18 U.S.C. 5034 pending a juvenile delinquency proceeding in order to assure the safety of others. The Committee agrees that there is no reason that assessments of the probability of future criminality should not also be permitted in the case of adult defendants awaiting trial.

In sum, the Committee has concluded that pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released.

While providing statutory authority for pretrial detention is a substantial change in federal law, it is well known that a substantial minority of federal defendants in the past have in fact been detained pending trial, primarily because of an inability to meet conditions of release.[109] Under the Bail Reform Act, it is permissible for a defendant to be detained if he is unable to meet conditions of release that have been determined by a judge to be reasonably necessary to assure his appearance. However, it has been suggested that the phenomenon of pretrial detention under the Bail Reform Act is often the result of intentional imposition of excessively stringent release conditions, and in particular extraordinarily high money bonds, in order to achieve detention. Furthermore, it has been suggested that in many cases, while the imposition of such conditions has apparently been for the purpose of assuring the de-

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[105] INSLAW study, *supra* note 91.

[106] *Id.* at 63–64.

[107] "Bail Reform Hearings," *supra* note 61 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[108] 18 U.S.C. 3148.

[109] In a study assessing the demonstration pretrial services agencies established under 18 U.S.C. 3152, of 31,108 Federal defendants, 4,766 (approximately 15 percent) were never released. Administrative Office of the United States Courts, "Fourth Report on the Implementation of the Speedy trial Act, Title II," June 29, 1979 at table III–1.

fendant's appearance at trial, the underlying concern has been the need to detain a particularly dangerous defendant, a concern which the Bail Reform Act fails to address.

Although there is a question of the extent to which the authority to set conditions of release may have been abused to achieve detention of particularly dangerous defendants, in view of the Bail Reform Act's failure to give judges any mechanism to address the inevitable and appropriate concern they would have about releasing an arrested person who appears to pose a serious risk to community safety, it is, as recently noted by Senator Hatch, "[n]o wonder many judges laboring under this law admit using 'extreme rationalizations in circumventing' this policy." [110] A similar view of this problem was expressed in testimony of the Department of Justice:

> That such instances of de facto detention of dangerous defendants would occur is hardly surprising * * *. [C]urrent law places our judges in a desperate dilemma when faced with a clearly dangerous defendant seeking release. On the one hand, the courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance, but actually to protect the public. Clearly, neither alternative is satisfactory. The first leaves the community open to continued victimization. The second, while it may assure community safety, casts doubt on the fairness of release practices.[111]

While the Committee does not sanction the use of high money bonds to detain dangerous defendants, criticism of this practice should be focused not on the judiciary, but rather on the deficiencies of the law itself, and indeed, on the delay in amending the law to cure this problem.

Providing statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others than no form of conditional release is sufficient to prevent; would allow the courts to address the issue of pretrial criminality honestly and effectively. It would also be fairer to the defendant than the indirect method of achieving detention through the imposition of conditions beyond his reach. The defendant would be fully informed of the issue before the court, the government would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly.

It is the intent of the Committee that the pretrial detention provisions of section 3142 are to replace any existing practice of detaining dangerous defendants through the imposition of excessively high money bond. Because of concern that the opportunity to use financial conditions of release to achieve pretrial detention

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[110] "Bail Reform Hearings," *supra* note 61 (statement of Senator Orrin G. Hatch).

[111] *Id.* (testimony of Jeffrey Harris, Deputy Associate Attorney General).

would provide a means of circumventing the procedural safeguards and standard of proof requirements of a pretrial detention provision, the Committee was urged to do away with money bond entirely.[112] Indeed, section 3142 of this bill as introduced in the 97th Congress did not provide for imposition of financial conditions of release. While the retention of money bond does create the potential for such abuse, the Senate concluded last year, after consideration of arguments for continuing to provide discretion to impose financial conditions of release, that the abolition of money bond is not justified. Instead, the bill assures the goal of precluding detention through use of high money bond by stating explicitly that "[t]he judge may not impose a financial condition that results in the detention of the person." [113] Retention of money bond was recommended by the Department of Justice, which noted that money bond has historically been one of the primary methods of securing the appearance of defendants and that this form of release has proved to be an effective deterrent to flight for certain defendants.[114]

The core pretrail detention provisions of section 3142 are set out in subsections (e) and (f). These and the other subsections of section 3142 are each discussed in detail below. Although section 3142—by permitting the consideration of dangerousness generally and by providing, in limited circumstances, for pretrial detention—represents a significant departure from the Bail Reform Act, many improvements made by the Bail Reform Act have been retained.

Subsection (a) provides that when a person charged with an offense is brought before a judicial officer, the judicial officer is required to pursue one of four alternative courses of action. He may release the person on his personal recognizance, or upon his execution of an unsecured appearance bond, pursuant to section 3142(b); he may release the person subject to one or more of the conditions listed in subsection (c); he may, if the arrested person is already on a form of conditional release or may be subject to deportation or exclusion order the person temporarily detained pursuant to subsection (d); or he may pursuant to subsection (e) order the detention of the person (after a hearing under subsection (f) that the judge is required to hold on the motion of the government if the defendant is charged with a specified offense described in subsection (f), or, if on motion of the government or the judicial officer there appears to be a serious risk that the defendant will flee or obstruct justice, or the defendant has a long record of felonies). The first two forms of pretrial release are like those now set forth in the Bail Reform Act,[115] and is anticipated that they will continue to be appropriate for the majority of federal defendants. Neither detention provision has a precedent in the Bail Reform Act, although there are similar provisions now incorporated in the District of Columbia Code.[116]

Subsection (b) requires the judicial officer to release the person on his own recognizance, or upon execution of an unsecured appearance bond in a specified amount, unless the judicial officer de-

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[112] Id. (testimony of Bruce D. Beaudin, Director, D.C. Pretrial Services Agency).
[113] Section 3142(c).
[114] Id. (testimony of Jeffrey Harris, Deputy Associate Attorney General).
[115] 18 U.S.C. 3146(a).
[116] D.C. Code, sec. 23-1322.

termines that such release will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community. Like the current section 18 U.S.C. 3146(a), subsection (a) emphasizes release on personal recognizance or unsecured appearance bond for persons who are deemed to be good pretrial release risks. However, unlike current law, in making the determination whether release under this subsection is appropriate, the judicial officer is to consider not only whether these forms of release are adequate to assure the appearance of the defendant, but also whether they are appropriate in light of any danger the defendant may pose to others. As discussed above, the Committee has determined that danger to the community is as valid a consideration in the pretrial release decision as is the presently permitted consideration of risk of flight. Thus, subsection (a), like the other provisions of section 3142, places the consideration of defendant dangerousness on an equal footing with the consideration of appearance.

The concept of defendant dangerousness is described throughout this chapter by the term "safety of any other person or the community." The reference to safety of any other person is intended to cover the situtation in which the safety of a particular identifiable individual, perhaps a victim or witness, is of concern, while the language referring to the safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community. The Committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence. This principle was recently endorsed in *United States* v. *Provenzano and Andretta,*[117] in which it was held that the concept of "danger" as used in current 18 U.S.C. 3148 extended to nonphysical harms such as corrupting a union. The Committee also emphasizes that the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the "safety of any other person or the community."[118]

If released under subsection (a) a person is subject to the mandatory condition that he not commit a Federal, State, or local crime while on release. Persons released under the discretionary conditions set out in subsection (c) are also subject to this mandatory condition, which is new to the law. While it may be self-evident that society expects all of its citizens to be law-abiding, it is particularly appropriate, given the problem of crimes committed by those on pretrial release, that this requirement be stressed to all defendents at the time of their release.[119] In addition, the establishment of probable cause to believe that a person on pretrial release has committed a crime will be sufficient to trigger the provisions of section 3148 in the bill, as amended, permitting revocation of release and the use of the court's contempt power.

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[117] 605 F. 2d 85 (3d Cir. 1979).

[118] Risk of continued drug activity is currently considered a danger to the community or other persons under current 18 U.S.C. 3148. See e.g., *United States* v. *Hawkins,* 617 F. 2d 59 (5th Cir.), cert. denied, 449 U.S. 952 (1980).

[119] This concept was endorsed in the commentary to the Uniform Rules of Criminal Procudure, supra note 2 at 64, citing an Arizona case to the effect that it is permissible to condition the pretrial release, by a requirement that the defendant conduct himself as a law-abiding citizen. *State of California* v. *Cassius,* 110 Ariz. 485 (1974).

Subsection (c) provides that if the judicial officer determines that release on personal recognizance or unsecured appearance bond will not reasonably assure the appearance of the person or will endanger the safety of any other person or the community, he is to release the person subject to the mandatory condition discussed above that he not commit an offense while on release, and subject to the least restrictive condition or combination of conditions set out in subsection (c)(2) that will provide such assurance. Except for financial conditions that can be utilized only to assure appearance, any of the discretionary conditions listed in subsection (c)(2) may be imposed either to assure appearance or to assure community safety.

Current 18 U.S.C. 3146 sets forth five specific conditions, including a catch-all permitting imposition of "any other condition deemed reasonably necessary to assure appearance as required."[120] The Committee has determined to maintain these five conditions with only minor modifications, and to increase the number of explicitly stated conditions by adding nine more. Although each of the additional conditions could appropriately be imposed today under the catch-all in current law, spelling them out in detail is intended to encourage the courts to utilize them in appropriate circumstances. Underutilization of some of these conditions today may occur because they are more relevant to the question of danger to the community than they are to the risk of flight. Since the court will be allowed to consider danger to the community in setting release conditions, some of these specified conditions will become of more utility, being more directly related to this new basis for qualifications on release.

It must be emphasized that all conditions are not appropriate to every defendant and that the Committee does not intend that any of these conditions be imposed on all defendants, except for the mandatory condition set out in subsection (c)(1). The Committee intends that the judicial officer weigh each of the discretionary conditions separately with reference to the characteristics and circumstances of the defendant before him and to the offense charged, and with specific reference to the factors set forth in subsection (g).

The first condition explicitly set forth in subsection (c)(2) is the familiar third party custodian provision of existing 18 U.S.C. 3146(a)(1), with one major change. The Committee endorses the use of third party custodians in appropriate cases. However, the Committee is aware of some recent criticism of the practice that indicates a high incidence of rearrest for those released to third party custodians in the District of Columbia.[121] To assure that third party custodians are chosen with care, the condition has been amended to require that the custodian agree to report any violation of a release condition and that he be reasonably able to assure the judge that the person will appear as required and that he will not pose a danger to the safety of any other person or the community. It is not intended by this provision that the custodians be held

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[120] 18 U.S.C. 3146(a)(5).

[121] The INSLAW study, *supra* note 91 at 54, 58, found that defendants released to third-party custodians seemed more likely to be rearrested than were defendants on other forms of pretrial release.

liable if the person to be supervised absconds or commits crimes while under the custodian's supervision. Rather it is intended to alert the judicial officer to the necessity of inquiring into the ability of proposed custodians to supervise their charges and to impress on the custodians the duty they owe to the court and to the public to carry out the supervision to which they are agreeing and to report any violations to the court.

Conditions set out in subparagraphs (B), (F), (H), (I), and (J) are new and deal respectively with employment or the active seeking of employment, reporting on a regular basis to a designated law enforcement officer, refraining from possessing dangerous weapons, refraining from excessive use of alcohol or any use of a controlled substance without a prescription, and undergoing available medical or psychiatric treatment. The conditions set out in subparagraph (C), dealing with maintaining or commencing an educational program, complements the condition concerning employment, for it recognizes that, particularly among youthful offenders, lack of basic education often significantly impairs their ability to find employment. The Committee believes that in appropriate cases each of these conditions is applicable to individual defendants on the issues of flight or assuring community safety.

The condition in subparagraph (D) deals with restrictions on travel, associations, and place of abode, and is drawn without substantive change from existing 18 U.S.C. 3146(a)(2).

Under subparagraph (G), a person may be required to abide by a specific curfew. Although this is a new provision, it is similar in purpose to the traditional conditions restricting travel and association.

The condition in subparagraph (E) is also new. It requires that, when imposed, the defendant avoid all contact with alleged victims of the crime and potential witnesses who may testify concerning the offense. It is a continuing complaint that victims and witnesses are intimidated by those released on bond [122] and, indeed, under current law, pretrial detention appears appropriate if witnesses are threatened.[123] This condition enables the court to raise the issue with the defendant before actual intimidation has occurred. In addition, in all releases the court will now be required to warn the defendant of the provisions of 18 U.S.C. 1503 (relating to the intimidation of witnesses, jurors, and officers of the court) and 18 U.S.C. 1510 (relating to destruction of criminal investigation) at the time of initial release.[124] Protecting against witness intimidation is most important to the fair and impartial administration of criminal justice. This condition should be imposed whenever the circumstances are such that the judge believes any form of victim or witness intimidation may occur.

The condition in subparagraph (K), although similar to the ten percent appearance bond condition set out in the current 18 U.S.C. 3146(a)(3), is designed to provide greater flexibility to the court in

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[122] In general see "Reducing Victim/Witness Intimidation: A Package," American Bar Association, Section of Criminal Justice Committee on Victims (1979).

[123] *See United States* v. *Gilbert* and *United States* v. *Wind*, *supra* note 93.

[124] Section 3142(f).

setting financial conditions of release. The concept of an appearance bond is retained, but the court has the discretion to determine what percentage of the amount of the bond is to be posted with the court. Where there is a substantial risk of flight, the judicial officer may require the posting of the entire amount. As an alternative to the posting of money, the court may require the execution of an agreement to forfeit designated property. When this alternative is employed the indicia of ownership of the property, such as the title to a car or the deed to real property, is to be posted with the court. A party other than the defendant may post money or execute an agreement to forfeit designated property under this paragraph, but in such a case the judicial officer should first ascertain whether the prospect of forfeiture by the third party would be sufficient to assure the appearance of the defendant. Generally such assurance will exist where there is a close relationship between the defendant and the third party, such as a family tie.

Subparagraph (L) carries forward the surety bond condition set forth in the current 18 U.S.C. 3146(a)(4). While the Committee is aware of criticism of the surety bond system generally, and of the recommendation of the American Bar Association to abolish the use of commercial sureties,[125] the surety bond option has been retained. However, the obligation of commercial sureties to assure the appearance of their clients, and, if necessary, actively to maintain contact with them during the pretrial period, is emphasized.

As discussed above, the Committee was urged in the last Congress to abolish financial conditions of release in order to insure that imposition of excessively high bonds was not used to achieve the detention of dangerous defendants. Although the Committee and the Senate decided to retain financial conditions of release, concern about the potential for such abuse does exist. Consequently, the use of the conditions of release set out in sections 3142(c)(2)(K) and 3142(c)(2)(L) is specifically limited to the purpose of assuring the appearance of the defendant.[126]

In addition, section 3142(c) provides that a judicial officer may not impose a financial condition of release that results in the pretrial detention of the defendant. The purpose of this provision is to preclude the sub rosa use of money bond to detain dangerous defendants. However, its application does not necessarily require the release of a person who says he is unable to meet a financial condition of release which the judge has determined is the only form of conditional release that will assure the person's future appearance. Thus, for example, if a judicial officer determines that a $50,000 bond is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judicial officer's finding to the contrary, he cannot meet the bond, although the judicial officer may reconsider the amount of the bond, if he concludes that the initial amount is reasonable and necessary then it would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section

[125] ABA Standards on Pretrial Release, *supra* note 84, Standard 10-1.3(c).

[126] In any event, a defendant who is a danger to the community remains dangerous even if he has posted a substantial money bond.

3142(e), is the basis for an order of detention, and therefore the judge may proceed with a detention hearing pursuant to section 3142(f) and order the defendant detained, if appropriate. The reasons for the judicial officer's conclusion that the bond was the only condition that could reasonably assure the appearance of the defendant, the judicial officer's finding that the amount of the bond was reasonable, and the fact that the defendant stated that he was unable to meet this condition, would be set out in the detention order as provided in section 3142(i)(1). The defendant could then appeal the resulting detention pursuant to section 3145.

Subparagraph (M) authorizes the judicial officer to condition release on the detainee's return to custody for specified hours following release for employment, schooling, or other limited purposes.

The condition set out in subparagraph (N) of section 3142(c)(2) tracks the catch-all provision of the current form of 18 U.S.C. 3146(a)(5), and permits the imposition of any other condition that is reasonably necessary to assure the appearance of the person as required and the safety of any other person and the community.

The final sentence of section 3142(c) retains the authority now set forth in 18 U.S.C. 3146(e) for the court to amend the release order at any time to impose different or additional conditions of release. This authorization is based on the possibility that a changed situation or new information may warrant altered release conditions. It is contemplated by the Committee that the imposition of additional or different conditions may occur at an ex parte hearing in situations where the court must act quickly in the interest of justice. In such a case, a subsequent hearing in the defendant's presence should be held promptly.[127] Either the defendant or the government may move for an amendment of conditions, or the court may do so on its own motion.[128]

Subsection (d) permits a judicial officer to detain a defendant for a period of up to ten days if it appears that the person is already in a conditional release status or is not a citizen of the United States or lawfully admitted for permanent residence under the Immigration and Naturalization Act, and the judicial officer further determines that the person may flee or pose a danger to any other person or to the community if released. The provision applies if the defendant, at the time of apprehension was on pretrial release for a Federal, State, or local felony; was on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or was on probation or parole for any Federal, State, or local offense; or was not a citizen of the United States or a lawful permanent resident. The ten-day period is intended to give the government time to contact the appropriate court, probation, or parole official, or immigration official and to provide the minimal time necessary for such official to take whatever action on the existing conditional release that official deems appropriate. This provision is based largely on a provision for a five-day hold in similar circum-

[127] Prior to establishing such new conditions, and prior to a hearing thereon, the court may revoke the defendant's release and order him arrested. *United States* v. *Gamble*, 295 F. Supp. 1192 (S.D. Tex. 1969).

[128] Authority for the Government to seek amendment of release conditions is likely implicit in current 18 U.S.C. 3146(e). See *United States* v. *Zuccaro*, 645 F.2d 104 (2d cir. 1981).

stances that is now the law in the District of Columbia. The Committee deems five days to be too short a period in which to expect proper notification and appropriate action by the original releasing body and thus has opted for ten days. It should also be noted that the District of Columbia measure is in effect a local provision and most of those under arrest to whom it applies are likely to be released either pretrial in the District of Columbia or be on parole or probation for a District offense; thus notification and appropriate action might more easily occur within the five day period. The Federal bail law, on the other hand, has national application, and in individual cases there will be need to consult and notify over longer distances; thus the time frame of ten days was adopted. While a deprivation of liberty of up to ten days is a serious matter, it must be balanced against the fact that the defendant has been arrested based on probable cause to believe that he has committed a crime, the fact that he is either already on conditional release, presumably subject to revocation for a prior offense or he is not in conformity with Immigration laws, and the fact that the court must find that he may flee or pose a danger to any other person or to the community if released. On balance the Committee concluded that a detention of up to ten days in those circumstances is warranted and is in the interests of justice.

As specified by the last sentence of subparagraph (d), an individual temporarily detained under (1)(B) has the burden to demonstrate to the court that he is a citizen or a lawful permanent resident.

Subsections (e) and (f) set forth the findings and procedures that are required for an order of detention. The standard for an order of detention of a defendant prior to trial is contained in subsection (e), which provides that the judicial officer is to order the person detained, if, after a hearing pursuant to subsection (f), he finds that no condition or combination of conditions of release will reasonably assure the appearance of the defendant as required and the safety of any other person and the community. The facts on which the finding of dangerousness is based must, under subsection (f), be supported by clear and convincing evidence. Thus, this subsection not only codifies existing authority to detain persons who are serious flight risks,[129] but also, as discussed extensively above, creates new authority to deny release to those defendants who are likely to engage in conduct endangering the safety of the community even if released pending trial only under the most stringent of the conditions listed in section 3142(c)(2).

For good reason the bill does not incorporate, as a precondition of pretrial detention, a finding that there is a "substantial probability" that the defendant committed the offense for which he is charged.[130] This "substantial probability" requirement was construed by the District of Columbia Court of Appeals in *United States* v. *Edwards, supra,* as being "higher than probable cause" and "equivalent to the standard required to secure a civil injunction." [131] However, as noted by the Department of Justice, the *Ed-*

[129] *United States* v. *Abrahams, supra* note 94.
[130] D.C. Code, sec. 23-1322(b)(2)(C).
[131] *United States* v. *Edwards, supra* note 22 at 38.

wards opinion strongly suggests that the probable cause standard consistently sustained by the Supreme Court as a basis for imposing "significant restraints on liberty" would be constitutionally sufficient in the context of ordering pretrial detention.[132] The Department pointed out that the burden of meeting the "substantial probability" requirement of the District of Columbia's pretrial detention statute was the principal reason cited by prosecutors for the failure, over much of the last ten years, to request pretrial detention hearings under that statute.

While this "substantial probability" requirement might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted, the Committee is satisfied that the fact that the judicial officer has to find probable cause will assure the validity of the charges against the defendant, and that any additional assurance provided by a "substantial probability" test is outweighed by the practical problems in meeting this requirement at the stage at which the pretrial detention hearing is held.[133] Thus, S. 215 contains no "substantial probability" finding.

In determining whether any form of conditional release will reasonably assure the appearance of the defendant and the safety of other persons and the community, the judicial officer is required to consider the factors set out in section 3142(g). The offense and offender characteristics that will support the required finding for pretrial detention under subsection (e) will vary considerably in each case. Thus the Committee has, for the most part, refrained from specifying what kinds of information are a sufficient basis for the denial of release, and has chosen to leave the resolution of this question to the sound judgment of the courts acting on a case-by-case basis. However, the bill does describe two sets of circumstances under which a strong probability arises that no form of conditional release will be adequate.

The first of these arises when it is determined that a person charged with a seriously dangerous offense has in the past been convicted of committing another serious crime while on pretrial release. Such a history of pretrial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to community safety and that he cannot be trusted to conform to the requirements of the law while on release. Section 3142(e) provides, therefore, that in a case in which a defendant is charged with one of the serious offenses described in section 3142(f)(1) (a crime of violence, a crime punishable by death, a crime for which the maximum term of imprisonment is prescribed in the Controlled Substances Import and Export Act (21 U.S.C. 951) or Sec. 1 of the Act of Sept. 15, 1980 (21 U.S.C. 955a) or an offense under 18 U.S.C. 924(c)), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the

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[132] "Bail Reform Hearings," *supra* note 80 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[133] Because of the requirements of Rules 4(a) and 5(a) of the Federal Rules of Criminal Procedure, probable cause that the defendant committed the offense with which he is charged must be established either prior to, or at the time of, the initial appearance. Furthermore, the issue of probable cause will subsequently be reexamined in the course of a preliminary hearing or in proceedings leading to the filing of an indictment.

safety of any other person and the community, if the judicial officer finds: (1) that the defendant had been convicted of another offense described in subsection (f)(1) (or a State or local offense that would have been such an offense if circumstances giving rise to federal jurisdiction had existed); (2) that this offense was committed while the person was on pretrial release; and (3) that no more than five years have elapsed since the date of conviction, or the defendant's release from imprisonment, for the offense, whichever is later. The Committee believes that it is appropriate in such circumstances that the burden shift to the defendant to establish a basis for concluding that there are conditions of release sufficient to assure that he will not again engage in dangerous criminal activity pending his trial. The term "crime of violence" is defined in Section 3156, as amended by the bill.

The Committee notes, moreover, that a case may involve circumstances that, while not set forth in the section as a basis for a rebuttable presumption of dangerous, nevertheless are so strongly suggestive of a person's willingness or inclination to resort to criminal violence as to warrant the inference that the person would be a danger to society even if released on the most restrictive conditions. The Committee has in mind, for example, the case of a person charged with an offense involving the possession or use of a firearm or destructive device. In the Committee's view, it would be difficult not to regard as an unreasonable risk to the safety of others a person who uses such a weapon in the course of committing a crime, or who possesses it under circumstances indicating a readiness or willingness to use it to carry out the crime.

The second rebuttable presumption arises in cases in which the defendant is charged with felonies described in 21 U.S.C. 841, 952(a), 953(a), 955, 959 which cover opiate substances and extends to offenses of the same gravity involving non-opiate controlled substances. These are the most serious drug offenses and involve either trafficking in opiates or narcotic drugs, or trafficking in large amounts of other types of controlled substances. It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses.[134] Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers. In view of these factors, the Committee has amended section 3142(e)

[134] "Bail Reform Hearings," supr. note 5 (testimony of Senator Lawton Chiles).

to provide that in a case in which there is probable cause to believe that the person has committed a grave drug offense, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the appearance of the person and the safety of the community.[135]

Subsection (f) specifies the cases in which a detention hearing is to be held and delineates the procedures applicable in such a hearing. Paragraphs (1) and (2) of subsection (f) describe the circumstances in which a pretrial detention hearing is required. Because detention may be ordered under section 3142(e) only after a detention hearing pursuant to subsection (f), the requisite circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial.

A pretrial detention hearing to determine whether there is any form of conditional release that will reasonably assure the appearance of the defendant as well as the safety of any other person and the community shall be held upon the motion of the government in a case in which the defendant is charged with an offense described in subsection (f)(1). The offenses set forth in subsection (f)(1) are a crime of violence, an offense punishable by life imprisonment or death, or an offense for which a maximum 10-year imprisonment is prescribed in the Controlled Substances Act, the Controlled Substances Import and Export Act or Section 1 of the Act of September 15, 1980. These offenses are essentially the same categories of offenses described in the District of Columbia Code by the terms "dangerous crime" and "crime of violence" for which a detention hearing may be held under that statute.[136] Subsection (f)(1) describes those offenses which comprise the greatest risk to community safety. The Committee has determined that whenever a person is charged with one of these offenses and the attorney for the government elects to seek pretrial detention. a hearing should be held so that the judicial officer will focus on the issue of whether, in light of the seriousness of the offense charged and the other factors to be considered under subsection (g), any form of conditional release will be adequate to address the potential danger the defendant may pose to others if released pending trial. Because the requirements of subsection (e) must be met before a defendant may be detained, the fact that the defendant is charged with an offense described in subsection (f)(1) is not, in itself, sufficient to support a detention order. However, the seriousness of the offenses described in subsection (f)(1) coupled with the government motion is a sufficient basis for requiring an inquiry into whether detention may be necessary to protect the community from the danger that may be posed by a defendant charged with one of these crimes.

Under (f)(1), a detention hearing may also be sought when a defendant charged with a serious offense has a substantial history of committing dangerous offenses. Specifically, the category described in subsection (f)(2)(d) refers to those cases in which a person charged with a felony has been convicted of two or more of the particularly serious offenses described in subsection (f)(1) or of State or

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[135] The concept of danger to the safety of the community includes drug trafficking. See *United States* v. *Hawkins*, supra note 116.

[136] D.C. Code, secs. 23-1322(a), 23-1331(3) and 23-1331(4).

local offenses that would have been offenses described in subsection (f)(1) if a criminal history is strongly indicative of a defendant's dangerousness, and thus is an adequate basis for convening a pretrial detention hearing.

Under subsection (f)(2), a pretrial detention hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in three types of cases. The first two types of cases, those involving either a serious risk that the defendant will flee, or a serious risk that the defendant will obstruct justice, or threaten, injure, or intimidate a prospective juror or witness, or attempt to do so, reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.[137]

Permitting the judicial officer to move for a pretrial detention hearing under the circumstances described in subsection (f)(2) is an improvement over the structure of the District of Columbia Code's pretrial detention statute which permits such a hearing only upon motion of the government. It is inappropirate that a judicial officer who believes that there may be a basis for denying release should be foreclosed from addressing this concern absent a motion for a detention hearing by the government. Therefore, this limitation of the District of Columbia pretrial detention provision has not been incorporated in section 3142(f).

If a detention hearing is justified because of the existence of circumstances described in subsection (f)(1) or (f)(2), the hearing is to be held immediately upon the person's first appearance before the judicial officer unless a continuance is sought by either the defendant or the government. Although a continuance may be necessary for either the defendant or the government to prepare adequately for the hearing, particularly if the defendant was arrested soon after the commission of the offense with which he is charged, the period of a continuance sought by the defendant and of one sought by the government is confined to five and three days, respectively, in light of the fact that the defendant will be detained during such a continuance. An extension of the continuance may be granted, however, for good cause. These time limitations are the same as those now incorporated in the pretrial detention provision of the District of Columbia Code.[138]

The procedural requirements for the pretrial detention hearing set forth in section 3142(f) are based on those of the District of Columbia statute[139] which were held to meet constitutional due process requirements in *United States* v. *Edwards*.[140] The person has a right to counsel, and to the appointment of counsel if he is financially unable to secure adequate representation. He is to be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and

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[137] *United States* v. *Gilbert* and *United States* v. *Wind*, *supra* note 93; *United States* v. *Abrahams* *supra* note 94.

[138] D.C. Code, sec. 23-1322(c)(3).

[139] D.C. Code, secs. 23-1322(c)(4) and 23-1322(c)(5). One element of the District of Columbia Code provision not carried forward in section 3142(f) is its 60-day limitation on the detention period which is set out in section 23-1322(d)(2)(A) of the District of Columbia Code. 18 U.S.C. 3161, specifically requires that priority be given to a case in which a defendant is detained, and also requires that his trial must, in any event, occur within 90 days, subject to certain periods of excludable delay, such as for mental competency tests. These current limitations are sufficient to assure that a person is not detained pending trial for an extended period of time.

[140] *Supra* note 99 at 25-42.

to present information by proffer or otherwise. As is currently provided with respect to information offered in bail determinations,[141] the presentation and consideration of information at a detention hearing need not conform to the rules of evidence applicable in cirminal trials. Pending the completion of the hearing, the defendant may be detained.

Because of the importance of the interests of the defendant which are implicated in a pretrial detention hearing, the Committee has specifically provided that the facts on which the judicial officer bases a finding that no form of conditional release is adequate reasonably to assure the safety of any other person and the community, must be supported by clear and convincing evidence. This provision emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary. Thus, for example, if the criminal history of the defendant is one of the factors to be relied upon, clear evidence such as records of arrest and conviction should be presented. (The Committee does not intend, however, that the pretrial detention hearing be used as a vehicle to reexamine the validity of past convictions.) Similarly, if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.

Subsection (g) enumerates the factors that are to be considered by the judicial officer in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community. Since this determination is to be made whenever a persons is to be released or detained under this chapter, consideration of these factors is required not only in proceedings concerning the pretrial release or detention of the defendant under section 3142, but also where release is sought after conviction under section 3143, where a determination to release or detain a material witness under section 3144 is to be made, or where a revocation hearing is held under section 3148(b).

Most of the factors set out in subsecton (g) are drawn from the existing Bail Reform Act and include such matters as the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the history and characteristics of the accused, including his character, physical and mental condition, family ties, employment, length of residence in the community, community ties, criminal history,[142] and record concerning ap-

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[141] 18 U.S.C. 3146(f). It is the intent of the Committee to retain current law so that any information presented or considered in any of the release or detention proceedings under this chapter need not conform to the rules of evidence applicable in criminal trials.

[142] Under current law, consideration of a defendant's criminal history is confined to his record of convictions. See 18 U.S.C. 3146(b). While a prior arrest should not be accorded the weight of a prior conviction, the Committee believes that it would be inappropriate to require the judge in the context of this kind of hearing to ignore a lenghty record of prior arrests, particularly if there were convictions for similar crimes. Similarly, it would be improper to prohibit consideration of prior arrests if there were also evidence that the failure to convict was due to the defendant's intimidation of witnesses. In any event, independent information concerning past criminal activities of a defendant certainly can, and should, be considered by a court.

pearance at court proceedings.[143] The Committee has decided to expand upon this list and to indicate to a court other factors that it should consider. These additional factors for the most part go to the issue of community safety, an issue which may not be considered in the pretrial release decision under the Bail Reform Act. The added factors include not only a general consideration of the nature and seriousness of the danger posed by the person's release, but also the more specific factors of whether the offense charged is a crime of violance or involves a narcotic drug, whether the defendant has a history of drug or alcohol abuse, and whether he was on pretrial release, probation, parole, or another form of conditional release at the time of the instant offense.[144]

Subsection (g) also contains a new provision designed to address a problem that has arisen in using financial conditions of release to assure appearance. The rationale for the use of financial conditions of release is that the prospect of forfeiture of the amount of a bond or of property used as collateral to secure release is sufficient to deter flight. However, when the proceeds of crime are used to post bond, this rationale no longer holds true. In recent years, there has been an increasing incidence of defendants, particularly those engaged in highly lucrative criminal activities such as drug trafficking, who are able to make extraordinarily high money bonds, posting bail and then fleeing the country. Among such defendants, forfeiture of bond is simply a cost of doing business, and it appears that there is a growing practice of reserving a portion of crime income to cover this cost of avoiding prosecution.[145]

The source of property used to fulfill a condition of release is thus an important consideration in a judicial officer's determination of whether such a condition will assure the appearance of the defendant.[146] In recognition of this, the Committee has provided in subsection (g) that the judicial officer, in considering the conditions of release described in sections 3142(c)(2)(K) and 3142(c)(2)(L), may upon his own motion, or shall upon the motion of the government, conduct an inquiry concerning the source of property to be designated for potential forfeiture or to be offered as collateral to secure a bond. The reference to "collateral to secure a bond" refers not only to property of the defendant or a third party which is to be directly used to secure release, but also money or other property which may be pledged or paid to a surety in order to secure his execution of a bond. The judicial officer must decline to accept the designation or use of property that, because of its source, would not reasonably assure the appearance of the defendant.[147]

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[143] 18 U.S.C. 3146(b). See *Wood* v. *United States*, 391 F.2d 981 (D.C. Cir. 1968); *United States* v. *Alston*, 420 F.2d 176 (D.C. Cir. 1969).

[144] The emphasis on drug-related factors and on prior criminal history is in accord with empirical research conducted in the District of Columbia which indicates a significant correlation between drug use and both failure to appear and pretrial rearrest, and between criminal history and pretrial rearrest. INSLAW study, *supra* note 91, 57–59 and 61–65.

[145] "Bail Reform Hearings," *supra* note 80. (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[146] The Committee notes that the authority to consider danger to the community, and the presumption that drug traffickers should be detained, alleviates the problem addressed here to some extent, since many major drug traffickers would simply be held without bond under the bill.

[147] The judicial officers may also decline accepting the property if the defendant refuses to explain its source. See *United States* v. *DeMorchena*, 330 F. Supp. 1223 (S.D. Cal. 1970), in which the court refused to accept a $50,000 surety bond secured by $55,000 delivered in cash to the bondsman until the defendant presented evidence as to the source of the money.

Such inquiries into the source of property used to secure release are currently used to some extent, and are commonly referred to as *Nebbia* hearings.[148] However, because of a lack of clear statutory authority to conduct such hearings, particularly with respect to corporate sureties,[149] many courts have refused government requests for any inquiry into the source of property used to post bond. Therefore, the Committee has, in subsection (g), provided for this statutory authority so that judicial officers may make informed decisions as to whether financial conditions of release will be sufficient to assure appearance of defendants.

The Committee also notes, with respect to the factor of community ties, that it is aware of the growing evidence that the presence of this factor does not necessarily reflect a likelihood of appearance,[150] and has no correlation with the question of the safety of the community. While the Committee considered deleting the factor altogether, it has decided to retain it at this time. However, the Committee wishes to make it clear that it does not intend that a court conclude there is no risk of flight on the basis of community ties alone; instead, a court is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community.

Subsection (h) provides that in issuing an order of release under subsection (b) or (c), the judicial officer is to include a written statement setting forth all the conditions of release in a clear and specific manner. He is also required to advise the person of the penalties applicable to a violation of the conditions and that a warrant for his arrest will be issued immediately upon such violation. A similar provision exists in current law.[151] However, failure to render such advice is not a bar or defense to prosecution for bail jumping under section 3146, as amended by the bill. This principle is in keeping with the intent of Congress in enacting the Bail Reform Act and the judicial interpretation of the Act.[152] The purpose of such advice is solely to impress upon the person the seriousness of failing to appear when required; such warnings were never intended to be a prerequisite to a bail jumping prosecution. Subsection (h) also requires the court to advise a defendant being released of the provisions of 18 U.S.C. 201(h), 201(i), 1503, 1505, 1510, 1512, and 1513 dealing with penalties for tampering with a witness, victim, or informant. This is intended to impress on the defendant the seriousness of such conduct. The issuance of such a warning is not a prerequisite to a prosecution under these sections of 18 U.S.C. designed to protect witnesses, victims, and informants.

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[148] *United States* v. *Nebbia*, 357 F. 2d 303 (2d Cir. 1966).

[149] Rule 46(d) of the Federal Rules of Criminal Procedure provides that every surety, except an approved corporate surety, may be required to file an affidavit listing the property used to secure the bond. This provision may implicitly authorize a hearing to inquire into the source of the property. The Rule's exemption of approved corporate sureties from this requirement raises a question whether similar inquiries can be made in the case of corporate sureties. At least two courts, however, have conducted such an inquiry. See *United States* v. *Melville*, 309 F. Supp. 824 (S.D., N.Y. 1970); *United States* v. *DeMorchena*, *supra* note 144.

[150] INSLAW study, *supra* note, 91, at 54, 58.

[151] 18 U.S.C. 3146(c).

[152] See *United States* v. *Cardillo*, 473 F. 2d 325 (4th Cir. 1973); *United States* v. *DeHugh*, 434 F. 2d 548 (18th Cir. 1970), cert. denied, 401 U.S. 978, (1971); *United States* v. *Eskew*, 469 F. 2d 278 (9th Cir. 1972).

Subsection (i) requires the court in issuing an order of detention to include written findings of fact and a written statement or reference to the hearing record specifying reasons for the detention. The court's order must also direct that the person be confined in a detention facility in accordance with subsection (j). A detention order may also include a recommendation not binding on the Attorney General, that the detainee receive special medical care.

Subsection (j) requires the Attorney General to promulgate regulations setting standards for the custody of individuals detained pending trial. Pursuant to (j)(1), those regulations, to the extent practicable, shall provide that the pretrial confinement separates the detainee from persons already convicted or persons who are defendants in the same case and that the pretrial confinement occur in a facility located near the court in which the detainee will be required to appear.[153] (j)(2) requires the regulations to provide that the detainee be afforded reasonable opportunity for consultation with his attorney. To the extent practicable, the regulations should also permit private visits of family and friends. Another mandatory aspect of the regulations will be provisions governing the deliverance of the detainee to an appropriate law enforcement officer upon court order or request of an attorney for the government. Finally the regulations, under (j)(4) shall provide for temporary release of the detainee in the custody of a U.S. Marshall or other appropriate person if necessary for preparation of the detainee's defense or for another compelling reason.[154]

Subsection (k) states that nothing in this section shall be construed as modifying or limiting the presumption of inocence. As stated in an earlier section of this report, the rule of evidence known as the presumption of innocence has been found by the Supreme Court to have "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." Supra, note 56; see also notes 48–67 and accompanying text. Thus, this provision states what the Committee understands to be the correct relationship of the presumption of innocence to pretrial release and detention authority.

SECTION 3143. RELEASE OR DETENTION OF A DEFENDANT PENDING SENTENCE OR APPEAL

This section makes several revisions in that portion of current 18 U.S.C. 3148 which concerns post-conviction release. Although there is clearly no constitutional right to bail once a person has been convicted,[155] 18 U.S.C. 3148 as well as this section statutorily permit release of a person while he is awaiting sentence or while he is appealing or filing for a writ of certiorari. The basic distinction between the existing provision and section 3143 is one of presumption. Under current 18 U.S.C. 3148 the judicial officer is instructed to threat a person who has already been convicted according to the release standards of 18 U.S.C. 3146 that apply to a

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[153] Whether a separation of the detained person from persons already convicted will be practicable is to be gauged in light of existing facilities. The Committee emphasizes that this provision is not intended to be used to require the construction of new detention facilities or renovation of existing facilities.

[154] The counterpart of subsection (i) appears at D.C. Code secs. 23-1321(h) and 23-1322(c).

[155] *United States* v. *Baca*, 444 F. 2d 1292, 1296 (10th Cir.), cert. denied, 404 U.S. 979 (1971).

person who has not been convicted, unless he has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. It has been held that although denial of bail after conviction is frequently justified, the current statute incorporates a presumption in favor of bail even after conviction.[156] It is the presumption that the Committee wishes to eliminate in section 3143.

In doing so the Committee has largely based section 3143 on a similar provision enacted in 1971 in the District of Columbia Code.[157] Before trial in non-capital cases the burden is properly on the government and the judge to find that the defendant is likely to flee or pose a danger before placing conditions on his release or, in appropriate cases, ordering his detention. Once guilt of a crime has been established in a court of law, however, there is no reason to favor release pending imposition of sentence appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.

Second, release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years. Section 3143 therefore, separately treats release pending sentence, release pending appeal by the defendant, and release pending appeal by the government.

As to release pending sentence, subsection (a) provides that a person convicted shall be held in official detention unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or to pose a danger to the safety of any other person or the community.

Subsection (a) also covers those awaiting the execution of sentence as well as its imposition. This is to make it clear that a person may be released in appropriate circumstances for short periods of time after sentence, when there is no appeal pending, for such matters as getting his affairs in order prior to surrendering for service of sentence. By authorizing release in such circumstances under section 3143, the subsection establishes that absconding after imposition of sentence, but prior to its execution, is a violation of the bail jumping statute[158] which applies to release pursuant to this section as well as section 3142.

Subsection (b) deals with release after sentence of a defendant who has filed an appeal or a petition for a writ of certiorari. Such person is also to be detained unless the judicial officer finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community. In addition, the court must affirmatively find that the appeal is not taken for the purpose of delay and that is raises a substantial question of law or fact likely to result in reversal or an order for a new trial. This is a further restriction on post conviction release. Under the current 18 U.S.C. 3148, release can be

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[156] *United States* v. *Bynum*, 344 F. Supp. 647 (S.D.N.Y. 1972).
[157] D.C. Code, sec. 23-1325.
[158] 18 U.S.C. 3146, as amended by the bill.

denied if it appears that the appeal is frivolous or taken for delay. The change in subsection (b) requires an affirmative finding that the chance for reversal is substantial. This gives recognition to the basic principle that a conviction is presumed to be correct.

Under both subsections (a) and (b), if the presumption in favor of detention can be overcome, the defendant is to be treated pursuant to the provisions of section 3142(b) or (c).

The Committee intends that in overcoming the presumption in favor of detention the burden of proof rests with the defendant. Under Rule 9(c) of the Federal Rules of Appellate Precedure the burden of proving that the defendant will not flee or pose a danger to any other person or to the community rests on the defendant.[159] This has been questioned as not reflecting the proper release presumption of the Bail Reform Act.[160]

Whether that is correct or not, the burden under this subsection is on the defendant to establish not only that he will not flee or pose a danger to the safety of any other person or the community, but also that his appeal under subsection (b) is not taken for purpose of delay but raises a substantial question of law or fact likely to result in reversal or an order for a new trial.[161]

Subsection (c) concerns release pending appeal by the government from orders of dismissal of an indictment or information and suppression of evidence pursuant to 18 U.S.C. 3731. As both of these kinds of appeals contemplate a situation in which the defendant has not been convicted, the defendant is to be treated under section 3142, the general provision governing release or detention pending trial. Subsection (c) is a new provision derived from 18 U.S.C. 3731. Use of the term "treated" removes an ambiguity in the current statute and makes it clear that the judicial officer may release or detain the defendant as provided in section 3142.[162] In such cases, the defendant, of course, would not have been convicted, and he thus should be treated in the same manner as a person who has not yet stood trial, as opposed to a person who has been tried and convicted.

SECTION 3144. RELEASE OR DETENTION OF A MATERIAL WITNESS

This section carries forward, with two significant changes, current 18 U.S.C. 3149 which concerns the release of a material witness. If a person's testimony is material in any criminal proceeding,[163] and if it is shown that it may become impracticable to secure his presence by subpeona, the government is authorized to take such person into custody.[164] A judicial officer is to treat such

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[159] See also Rule 46(c) of the Federal Rules of Criminal Precedure.

[160] See "Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach," 57 Texas L. Rev. 275 (1979).

[161] The advisory notes to Rule 9(c) of the Federal Rules of Appellate Precedure state that the burden of showing that the appeal appears to be frivolous or taken for delay rests with the government. The Committee intends that under section 3143 the burden of showing the merit of the appeal should now rest with the defendant. Rule 9(c) should be changed by the Judicial Conference to conform to this section.

[162] Cf. *United States* v. *Herman*, 554 F.2d 791, 794-795 n. 5 (5th Cir. 1971) noting the ambiguity in current 18 U.S.C. 3731.

[163] A grand jury investigation is a "criminal proceeding" within the meaning of this section. *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971).

[164] Ibid.

a person in accordance with section 3142 and impose those conditions of release that he finds to be reasonably necessary to assure the presence of the witness as required, or if no conditions of release will assure the appearance of the witness, order his detention as provided in section 3142. However, if a material witness cannot comply with the release conditions or there are no release conditions that will assure his appearance, but he will give a deposition that will adequately preserve his testimony, the judicial officer is required to order the witness' release after the taking of the deposition if this will not result in a failure of justice.

The first change in current law is that, in providing that a material witness is to be treated in accordance with section 3142, section 3144 would permit the judicial officer to order the detention of the witness if there were no conditions of release that would assure his appearance. Currently, 18 U.S.C 3149 ambiguously requires the conditional release of the witness in the same manner as for a defendant awaiting trial, yet the language of the statute recognizes that certain witnesses will be detained because of an inability to meet the conditions of release imposed by the judicial officers. The Committee believes that judicial officers should have the authority to detain material witnesses as to whom no form of conditional release will assure their appearance, in the same manner as provided in section 3142 for defendants awaiting trial.[165] However, the Committee stresses that whenever possible, the depositions of such witnesses should be obtained so that they may be released from custody.

The other change the Committee has made is to grant the judicial officer not only the authority to set release conditions for a detained material witness, or, in an appropriate case, to order his detention pending his appearance at the criminal proceeding, but to authorize the arrest of the witness in the first instance. It is anomolous that current law authorizes release conditions but at the same time does not authorize the initial arrest. In one case dealing with this problems, the Ninth Circuit found the power to arrest material witness to be implied in the grant of authority to release him on conditions under 18 U.S.C. 3149.[166] In its research on the law, the court discovered that specific arrest authority existed in Federal law from 1790 to 1948. The court concluded that the dropping of the authority in the 1948 revision of Federal criminal laws was inadvertent. The Committee agrees with that conclusion and expressly approves the finding of the implied right to arrest in the authority granted to the judicial officer to release on conditions that is set forth in 18 U.S.C. 3149. To cure this ambiguity, the Committee has added to section 3144 (the successor to 18 U.S.C. 3149) specific language authorizing the judge to order the arrest of a material witness.

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[165] Of course a material witness is not to be detained on the basis of dangerousness.

[166] *Bacon* v. *United States*, *supra* note 130; see also, *United States* v. *Anfield*, 539 F.2d 674, 677 (9th Cir. 1976).

SECTION 3145. REVIEW AND APPEAL OF A RELEASE OR DETENTION ORDER

Section 3145 sets forth the provisions for the review and appeal of release and detention orders. Subsection (a) and (b) provide for the review of release and detention orders by the court having original jurisdiction over the offense in situations in which the order is initially entered by a magistrate, or other court not having original jurisdiction over the offense, (other than a federal appellate court). The review of release orders is governed by subsection (a), which permits the defendant to file a motion for amendment of the conditions of his release and permits the government to file a motion for amendment of the release conditions or for revocation of the release order. Subsection (b) gives the defendant a right to seek review of a detention order analogous to his right to seek review of a release order under subsection (a)(2).

Subsection (c) grants both the defendant and the government a right to appeal release or detention orders, or decisions denying the revocation or amendment of such orders. Appeals under this section are to be governed by 28 U.S.C. 1291 in the case of an appeal by the defendant and by 18 U.S.C. 3731 in the case of an appeal by the government. Section 3 of the bill amends 18 U.S.C. 3731 to provide specific authority for the government to appeal release decisions. Since both 28 U.S.C. 1291 and 18 U.S.C. 3731, as amended by the bill, provide only for appeals decisions or orders of a district court, if the release or detention order was not originally entered by a judge of a district court, review by the district court must first be sought under section 3145 (a) or (b) before an appeal may be filed under section 3145(c). This concept, not included in 18 U.S.C. 3148, promotes a more orderly and rational disposition of issue involving release determination. Like motions for review of detention or release orders under subsection (a) and (b), appeals under subsection (c) are to be determined promptly.[167]

Although based in part on the current 18 U.S.C. 3147, section 3145 makes two substantive changes in present law. First section 3145 permits review of all releases and detention orders. Under 18 U.S.C. 3147, review is confined to those situations in which the defendant has been detained or has been ordered released subject to the condition that he return to custody after specified hours, and appeals to the courts of appeals are permitted only after the defendant has sought a change in the conditions from the trial court. Section 3145 would provide defendants with the opportunity to appeal the conditions of their release irrespective of whether they were in fact detained because of an inability to meet those conditions, and it would permit direct appeal to the court of appeals rather than requiring the defendant to go back to the trial court. Only if the conditions were imposed by a court other than the trial court would the defendant be required to seek a change in the conditions from the trial court before appealing to the court of appeals.

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[167] The procedures for such appeals, which are set forth in Rule 9 of the Federal Rules of Appellate Procedure, are designed, as stressed in the advisory notes, to facilitate speedy review if relief is to be effective.

The second, and more significant change, is that section 3145, in conjunction with the amendment to 18 U.S.C. 3731 set out in section 3 of the bill would specifically authorize the government, as well as the defendant, to seek review and appeal of release decisions. The Bail Reform Act makes no provisions for review of decisions upon motion of the government, although this authority may be implicit in the Act.[168] The Department of Justice urged that the government be granted specific authority to seek review of release decisions to the same extent that such authority is given defendants, and the Committee agrees that, as a matter of both basic fairness and sound policy, the government, on behalf of the public, should have such an opportunity. There is a clear public interest in permitting review of release orders which may be insufficent to prevent a defendant from fleeing or committing further crimes.

SECTION 3146. PENALTY FOR FAILURE TO APPEAR

The purpose of section 3146 is to deter those who would obstruct law enforcement by failing knowingly to appear for trial or other judicial appearances and to punish those who indeed fail to appear. The section basically continues the current law offense of bail jumping.

The present bail jumping offense is 18 U.S.C. 3150 which was enacted in 1966 as part of the Bail Reform Act of 1966.[169] The Federal bail jumping statute was first enacted in 1954 to fill the void in the criminal law highlighted by the conduct of fleeing fugitives who were leaders of the Communist Party. The only available penalties, at that time, were forfeiture of money and contempt proceedings. In the absence of an indictable offense of bail jumping, defendants were able to buy their freedom by forfeiting their bonds and taking the risk that they could go unapprehended. Even if apprehended, many defendants could hide for periods long enough for the government's case, especially for major offenses, to grow weaker because of the unavailability of witnesses, memory lapses, and the like, and thereby defeat the government's prosecutive efforts. They would then be subject only to the criminal contempt charge, the sentence for which was usually of considerably less gravity than for the original offense. These were the reasons that led to the original Federal bail jumping statute of 1954. Those same reasons underlie current 18 U.S.C. 3150 and proposed section 3146 of this bill.

A violation of the current bail jumping statute requires, first, that a person, be released pursuant to the provisions of the Bail Reform Act,[170] and, second, that "he willfully fail . . . to appear before any courts or judicial officer, as required." The word "willfully" as used in the statute has been interpreted to mean that the omission of failing to appear was "voluntary . . . and with the

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[168] See *United States* v. *Zuccaro*, *supra*, which held that the right of the government to seek reconsideration of a bail determination by the trial court is implicit in the Bail Reform Act. Since 18 U.S.C. 3147(b) permits appeal of release decisions only when the defendant has been detained, it is doubtful that the government has any right to appeal, as opposed to a right to seek reconsideration of, a release decision under the Act.

[169] 18 U.S.C. 3146 et seq.

[170] This probably does not apply to an individual released on bail in connection with a charge of juvenile delinquency, since the Bail Reform Act speaks in terms of persons "charged with an offense". 18 U.S.C. 3146; see also 18 U.S.C. 3148, 5034.

purpose of violating the law, and not by mistake, accident, or in good faith." [171] Furthermore, actual notice of the appearance date has been held unnecessasry in the face of evidence of the defendant's willful failure to appear.[172] The requirement that the person fail to appear "before any court or judicial officer" has led at least one court to hold that it is not an offense under 18 U.S.C. 3150 to fail to surrender to a United States marshal to begin service of sentence as ordered.[173]

A violation of 18 U.S.C. 3150 carries a maximum term of five years in prison if the defendant was released in connection with a charge of felony, or if he was released while awaiting sentence, or pending appeal or petition for certiorari after conviction for any offense. If the defendant has been released on a charge of misdemeanor or as a material witness, bail jumping carries a maximum penalty of one year in prison. The statute also calls for a forfeiture of any security given for his release. However, such a forfeiture is not a condition precedent to bringing a prosecution for bail jumping.[174]

Section 3146 of the bill, as reported, basically continues the current law offense of bail jumping although the grading has been enhanced to more nearly parallel that of the underlying offense for which the defendant was released. This enhanced grading provision is designed to eliminate the temptation to a defendant to go into hiding until the government's case for a serious felony grows stale or until a witness becomes unavailable, often a problem with the passage of time in narcotics offenses, and then to surface at a later date with criminal liabiity limited to the less serious bail jumping offense. A specific provision has been added to make clear that the failure to surrender for rent law offense of bail jumping although the grading has been enservice is covered as a form of bail jumping. The forfeiture provisions of current law are retained in Rule 46(f) of the Federal Rules of Criminal Procedure. This should make it even more clear that a forfeiture of security is in no way a prerequisite for prosecution of bail jumping.

As noted, the basic offense set forth in section 3146 parallels current law. Subsection (a) provides that a person commits an offense if after having been released pursuant to the provisions of chapter 207 of title 18 U.S.C., as amended by the bill: (1) he knowingly fails to appear before a court as required by the conditions of his release; or (2) he knowingly fails to surrender for service of sentence pursuant to a court order.

By use of the term "knowingly" as a mental state requirement, the Committee intends to perpetuate the concept of "willfully" which appears in the current bail jumping statute as interpreted in *United States* v. *DePugh* [175] *and United States* v. *Hall.*[176] Often a

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[171] *United States* v. *Bourassa*, 411 F.2d 69, 74 (10th Cir.), cert. denied, 396 U.S. 915 (1969).

[172] *United States* v. *Depugh*, 434 F.2d 548 (8th Cir. 1970), cert. denied, 401 U.S. 978 (1971); *United States* v. *Bourassa*, 411 F.2d 69, 74 (10th Cir.), cert. denied, 396 U.S. 915 (1969).

[173] *United States* v. *Wray*, 369 F. Supp. 118 (W.D. Mo. 1970); but see *United States* v. *Bright*, 541 F.2d 471 (5th Cir. 1976), and *United States* v. *West*, 477 F.2d 1056 (4th Cir. 1973), reaching the opposite conclusion on the ground that the marshal is an agent of the court for these purposes.

[174] *United States* v. *DePugh*, 434 F.2d 548 (8th Cir. 1970), cert. denied, 401 U.S. 978 (1971); *United States* v. *Bourassa*, *supra* note 36.

[175] *Supra* note 174.

[176] 346 F.2d 875 (2d Cir.), cert, denied, 382 U.S. 919 (1965).

defendant realizes that he may have to appear but simply disappears, moves and fails to leave a forwarding address, fails to keep in touch with his attorney, or does not respond to notices and when later apprehended defends on the grounds that he was out of town on the designated appearance date, that he never received any notice, or the like. Under the standard contemplated by the Committee, the defendant could be convicted for bail jumping upon a showing that he was aware that an appearance date will be set and that there will be a resulting failure to appear. Conduct involving a failure to keep in contract and in touch with the situation amounts to a conscious disregard that an appearance date will come and pass. A person released on bail can be charged with a gross deviation from the standard of conduct applicable to the ordinary person when he fails to keep in touch with the status of his case or places himself out of reach of the authorities and his attorney.[177]

Subsection (c) provides that it is an affirmative defense that "uncontrollable circumstances prevented the defendant from appearing or surrendering, that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that the defendant appeared or surrendered as soon as such circumstances ceased to exist." It is intended that the defense should apply where, for example, a "person is recuperating from a heart attack and to leave his bed would imperil his life, or, after he had made careful plans for transportation to the court house, his vehicle breaks down or unexpected weather conditions bring traffic to a halt." The requirement of appearance or surrender as soon as circumstances permit was included by the Committee for two reasons: first, in order to confirm the defendant's lack of bad faith in failing to appear or surrender; and, second, to encourage the defendant to appear or surrender even after he fails to so do as required. Since the defense is denominated as "affirmative", the defendant will bear the burden of proof as to the elements thereof by a preponderance of the evidence.

Section 3146 provides that a person must have "been released pursuant to the provisions of chapter 207 of title 18 U.S.C. in order for the offense to apply. This bill revises chapter 207 and puts within the bail jumping offense anyone released under the chapter, including material witnesses.

After requiring that the offender has been released pursuant to the provisions of this Act, subsection (a)(1) goes on to require that the released person fail to appear before "a court as required by the conditions of his release." The word "court" is intended to include the presiding judicial officer, and is intended to include any person authorized pursuant to section 3141 of the bill, as reported, and the Federal Rules of Criminal Procedure to grant bail or otherwise release a person charged with or convicted of a crime or who is a material witness.[178] It is not intended to cover such lesser court officials as probation officers, marshals, bail agency personnel, and the like. The holding in *United States* v. *Clark*[179] that a

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[177] See *United States* v. *Bright*, *supra* note 38. Compare *Gant* v. *United States*, 506 F.2d 518 (8th Cir. 1974), cert. denied, 420 U.S. 1005 (1975).

[178] See 18 U.S.C. 3141.

[179] 412 F. 2d 885 (5th Cir. 1969).

probation officer is not a judicial officer so that a failure to appear before him as required by the court is not bail jumping is specially endorsed, and section 3146 should be iterpreted to reach the same results. Bail jumping is an offense intended to apply to actual court appearances before judges or magistrates and not to other court personnel, with the sole exception of a failure to surrender for service of sentence, as covered in subsection (a)(2). In this situation the Committee believes that the failure to appear is tantamount to a failure to appear before a court and is equally deserving of punishment.[180]

The term "as required" in subsection (a)(1) has been held not to be unconstitutionally vague when combined with a requirement of "willfully," [181] or "knowingly" in the case of this bill.

As indicated in connection with the discussion of the culpability standard, it is often the case that accused persons who by their own acts place themselves out of touch with the authorities defend on the basis that they never received actual notice of a scheduled appearance date and thus cannot be charged with a failure to appear "as required." Actual notice of an appearance date, however, is not an element of the offense under 18 U.S.C. 3150, the language of which is similar to that of proposed section 3146.[182] The burden on the government is only to see that reasonable efforts are made to serve notice on the defendant as to any mandatory court appearance. In *United States* v. *DePugh, supra,* the defendant had gone underground and had left no forwarding address with court officials or his attorney. Notice of this trial date was given to the defendant's wife at his last known address and to the defendant's attorney. Such notice was deemed sufficient to make the appearance "as required." It would also suffice under section 3146.

Under the current section 3146(c) of title 18 the United States Code, provides that a judicial officer authorizing a release under the Bail Reform, Act must issue an order that, inter alia, informs the released person of the penalties applicable for violation of the conditions of release. In *DePugh,* it was argued that issuance of such an order is a condition prerequisite to a bail jumping prosecution under 18 U.S.C. 3150. That contention was rejected. The court cited the legislative history of 18 U.S.C. 3150 to find that 18 U.S.C. 3146(c) is designed to enhance the deterrent value of criminal penalties but that it was not intended to establish the issuance of the order as prerequisite to subsequent prosecution. That history and the *DePugh* holding with respect to the effect of 18 U.S.C. 3146(c) are specifically endorsed.

As noted above, the grading for the new section 3146 has been designed to parallel the penalty for the offense for which the defendant has been released. Under current 18 U.S.C. 3150, the penalties for bail jumping are a $5,000 fine and five years' imprisonment, where the defendant was released in connection with a felony charge, and a fine of $1,000 and one year's imprisonment,

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[180] *United States* v. *Wray,* 369 F. Supp. 118 (W.D.Mo. 1970); but see *United States* v. *Bright,* 541 F. 2d 471 (5th Cir. 1976), and *United States* v. *West,* 477 F. 2d 1056 (4th Cir. 1973), rreaching the opposite conclusion on the ground that the marshal is an agent of the court for these purposes.

[181] See *United States* v. *DePugh, supra* note; 174.

[182] *Ibid.; United States* v. *Bourassa, supra* note 37.

where the defendant was released in connection with a misdemeanor or in the case of a failure to apear as a material witness. The Department of Justice strongly urged that the penalties for bail jumping be amended to more closely parallel the penalties for the offense in connection with which the defendant was released.[183] The Committee endorses his suggestion as a means of enhancing the effectiveness of the bail jumping offense as a deterrent to flight. Thus, the penalties for bail jumping set out in proposed section 3146, are to be (1) up to a $25,000 fine and ten years' imprisonment where the offense was punishable by death, life imprisonment, or up to fifteen years' imprisonment; (2) up to a $10,000 fine or imprisonment for 5 years, where the offense was punishable by more than five, but less than fifteen years' imprisonment; (3) a fine of not more than $5,000 and imprisonment for not more than two years, if the offense was any other felony; and (4) a fine of not more than $2,000 and imprisonment for not more than one year, if the offense was a misdemeanor. The current penalties for failure to appear as a material witness, *i.e.*, not more than a $1,000 fine and imprisonment for one year are retained in section 3146(b)(2).

Subsection (d) of section 3146, simply emphasizes that in addition to the penalties of fine and imprisonment provided for bail jumping, the court may also order the person to forfeit any bond or other property he has pledged to secure his release if he has failed to appear. This subsection also makes it clear that such forfeiture may be ordered irrespective of whether the person has been charged with the offense of bail jumping under section 3146.

SECTION 3147. PENALTY FOR AN OFFENSE COMMITTED WHILE ON RELEASE

Section 3147 is designed to deter those who would pose a risk to community safety by committing another offense when released under the provisions of this bill and to punish those who indeed are convicted of another offense. This section enforces the self-evident requirement that any release ordered by the courts include a condition that the defendant not commit another crime while on release. Given the problem of crime committed by those on pretrial release as outlined by some of the studies briefed in an earlier section of this report, this requirement needs enforcement. Accordingly, this section prescribes a penalty in addition to any sentence ordered for the offense for which the defendant was on release. This additional penalty is a term of imprisonment of at least two years and not more than ten if the offense committed while on release is a felony. If the offense committed while on release is a misdemeanor, this additional penalty is at least 90 days and not more than one year.

SECTION 3148. SANCTIONS FOR VIOLATIONS OF RELEASE CONDITIONS

Section 3148 provides in subsection (a) for two distinct sanctions that are applicable for persons released pursuant to section 3142[184] who violate a condition of their release—revocation of re-

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[183] "Bail Reform Hearings," *supra* note 72 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

[184] All releases under the provisions of this bill, whether pretrial or pending sentence or appeal, are technically pursuant to section 3146. Thus the sanctions of section 3146 are applicable to all releases pursuant to this subsection.

lease and an order of detention, and a prosecution for contempt of court. One of the criticisms of the Bail Reform Act has been its failure to provide adequate sanctions for violation of release conditions; section 3148 provides such sanctions.

Subsection (b) sets out the procedure for revocation of release. Specific provisions for revocation of release are new to Federal bail law, although a similar provision exists in the District of Columbia Code.[185] The Committee has received testimony recommending such a provision,[186] and has adopted the concept.[187] Revocation is based upon a betrayal of trust by the person released by the court on conditions that were to assure both his appearance and the safety of the community. It should be noted that, as all persons are released under the mandatory condition under sections 3142(b) and 3142(c)(1) that they not commit a Federal, State, or local crime during the period of release, establishment of probable cause that a crime has been committed while a person was released is sufficient to trigger the revocation procedure of section 3148, as is a violation of any of the discretionary release conditions set for the defendant pursuant to section 3142(c)(2).

The attorney for the government can initiate the revocation proceeding by filing a motion to that effect with the court. A judicial officer may then issue an arrest warrant and have the person brought before the court in the district in which his arrest was ordered for a revocation hearing. An order of revocation and detention will issue at this hearing if the court finds, first, that there is either probable cause to believe that the person has committed a Federal, State, or local crime while on release, which, as noted above is a violation of a mandatory condition imposed on all released persons, or clear and convincing evidence that the person has violated any other condition of his release; and, second, that either no condition or combination of conditions can be set that will assure that the person will not flee or pose a danger to the safety of any other person or the community, or that no condition or combination of conditions will assure that the person will abide by reasonable conditions. This latter provision is intended to reach the situation in which a defendant continuously flouts the court by disobeying conditions such as restrictions on his association or travel, and in which it is clear that he will continue to do so. If the court finds that there are conditions that will assure both appearance and safety and that the person will abide by such conditions, he is to be released pursuant to section 3142 on appropriate conditions, which may be an amended version of the earlier conditions.

In testimony before the Committee, the Department of Justice recommended that revocation of release be required if the person committed another serious crime while on release.[188] The commission of a serious crime by a released person is plainly indicative of his inability to conform to one of the most basic conditions of his

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[185] D.C. Code, sec. 23-1329.

[186] Hearings. Reform of the Federal Criminal Law. U.S. Senate. Committee on the Judiciary, part XIV, p. 10323 (testimony by Professor Alan Dershowitz) (1979).

[187] Revocation is also recommended by the ABA 1978 Standards, *supra* note 76, Standard 10-5.7 and by the Uniform Rules of Criminal Procedure, *supra*, note. Rule 341(e).

[188] "Bail Reform Hearings," *supra* note 80 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

release, i.e. that he abide by the law, and of the danger he poses to other persons and the community, factors which section 3148 recognizes are appropriate bases for the revocation of release. Nonetheless, there may be cases in which a defendant may be able to demonstrate that, although there is probable cause to believe that he has committed a serious crime while on release, the nature or circumstances of the crime are such that revocation of release is not appropriate. Thus, while the Committee is of the view that commission of a felony during the period of release generally should result in the revocation of the person's release, it concluded that the defendant should not be foreclosed from the opportunity to present to the court evidence indicating that this sanction is not merited. However, the establishment of probable cause to believe that the defendant has committed a serious crime while on release constitutes compelling evidence that the defendant poses a danger to the community, and, once such probable cause is established, it is appropriate that the burden rest on the defendant to come forward with evidence indicating that this conclusion is not warranted in his case. Therefore, the Committee has provided in section 3148(b) that if there is probable cause to believe that the person has committed an offense while on release, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community.

Subsection (c) emphasizes that the court may impose contempt sanctions if the person has violated a condition of his release. This carries forward the provisions of existing 18 U.S.C. 3151.

SECTION 3149. SURRENDER OF AN OFFENDER BY A SURETY

Except for minor word changes, this provision is identical to 18 U.S.C. 3142. The section provides that in cases where a person is released on an appearance bond with a surety, such person may be arrested by his surety and delivered to a United States Marshal and brought before the court. The person so returned will be retained in custody until released pursuant to this chapter or under other provisions of law. The language is amended to delete as outmoded the authority of the surety to request detention of the defendant, and to substitute a requirement that the judge determine whether to revoke release in accord with section 3148.

SECTION 3150. APPLICABILITY TO A CASE REMOVED FROM A STATE COURT

This section specifies that the release provisions of chapter 207 of 18 U.S.C., as amended by the bill, are to apply to a case removed to a federal court from a State court. Current 18 U.S.C. 3144, relating to detention of a State prisoner whose case is before the United States Supreme Court, is deleted. It is expected that decisions on release in such cases will ordinarily be made by the State courts under State law.

SECTION 3062. GENERAL ARREST AUTHORITY FOR VIOLATION OF RELEASE CONDITIONS

Section 3062 is new. It grants to a law enforcement officer who is authorized to make arrests for offenses committed in his presence the authority to arrest a person released under this Act if the officer has reasonable grounds to believe the person is violating in his presence a condition of release imposed on the person under subsection 3142(c)(2)(D) (relating to restrictions on personal associations, place of abode, or travel), subsection (c)(2)(E) (relating to avoidance of contact with the alleged victims of the crime and potential witnesses), subsection (c)(2)(H) (relating to possession of a firearm, destructive device, or other dangerous weapon), subsection (c)(2)(I) (relating to refraining from excessive use of alcohol or illegal use of narcotics or other controlled substances), or subsection (c)(2)(M) (relating to part-time custody) of section 3142 (Release or Detention of a Defendant Pending Trial). While, as a technical matter, a defendant who violates any condition of his release is guilty of contempt because he has violated a court order, the Committee has added this provision to assure that law enforcement officers with arrest authority for offenses committed in their presence are made especially aware of the importance of arresting a person on release who is subject to one of the conditions that is aimed primarily at preventing further crimes by the defendant and assuring against harm to victims and witnesses.

REGULATORY IMPACT EVALUATION

In compliance with subsection 11(b) of rule XXVI of the Standing Rules of the Senate, the committee finds that no significant regulatory impact as defined by that subsection will result from the enactment of S. 215.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 24, 1983.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 215, the Bail Reform Act of 1983.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE

1. Bill number: S. 215.
2. Bill title: Bail Reform Act of 1983.
3. Bill status: As ordered reported by the Senate Committee on the Judiciary, May 10, 1983.
4. Bill purpose: The Bail Reform Act of 1983 amends the The Bail Reform Act of 1966 to permit federal judges to take into considera-

tion the danger to the community a defendant is believed to present in setting pretrial release conditions, to permit pretrial and presentence detention of certain individuals, and to alter the structure of sanctions for violators of release conditions. The bill contains no new authorizations.

S. 215 requires federal judicial officers to hold a hearing in cases involving crimes of violence, offenses for which the maximum sentence is life imprisonment or death, certain drug offenses, and in certain other cases to determine whether any release conditions or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of any other person or the community. If the judicial officer determines that the person was on release pending trial for a felony, on release pending imposition, execution, or completion of sentence, or on probation or parole, at the time the offense was committed, he must order the temporary detention of the person. If the judicial officer determines that the public safety cannot be guaranteed by releasing the individual under certain conditions, he is empowered to order the pretrial detention of the individual. In any event, the defendant may be detained pending completion of this hearing.

If the defendant is found guilty and the judicial officer finds that the individual might flee or pose a danger to the community's safety if released, the officer must order the detention of the individual pending sentencing. If an individual is convicted of committing an offense while on release, the bill requires that the individual be imprisoned for an additional period of time, the length of which varies with the seriousness of the offense.

S. 215 also allows appeal of release and detention orders, restructures the penalties for failure to appear, and makes other technical and conforming changes.

5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1983	1984	1985	1986	1987	1988
Estimated authorization level	2	22	45	49	52	54
Estimated Outlays	2	20	42	48	51	54

Note. The costs of this bill fall within budget function 750.

Basis of estimate.—In developing this etimate, CBO made the following basic assumptions. First, it is assumed that the number of federal defendants will continue at the recent historical average (approximately 44,000 per year). Second, CBO assumes that any increase in detention or incarceration will be absorbed by existing federal facilities, or by the use of state and local facilities to imprison federal offenders. While any increase in detention and incarceration will impose further burdens on federal, state, and local correctional facilities, and may, in the long term, contribute to the need for new facilities, there is no basis for relating the effects of this bill, by itself, to the need for future prison construction. Finally, CBO assumes the bill will become effective on July 1, 1983.

Based on survey data provided by the Pretrial Services Agency (PSA) on the types of crimes committed by federal defendants, CBO

estimates that approximately 19 percent of the total population of federal defendants will be affected by this bill. About 75 percent of these people, or 14.5 percent of the total federal defendant population, are individuals arrested for a violent personal crime who are detained only temporarily prior to their trial. Those persons never detained, never released, or charged with a nonviolent crime are excluded. Violent crimes are defined here as those generally meeting the guidelines established in the bill and include all violent personal crimes (with and without injury), all armed offenses, all drug offenses for which the maximum term of imprisonment is ten or more years, and all offenses for which the maximum sentence is death or life imprisonment. In addition, another 4.9 percent of all federal defendants do not fall in the above category, but have either prior felony convictions or drug arrests which would make them eligible for detention under this bill.

For those individuals arrested for a crime specified in the bill, S. 215 mandates that a detention hearing be held upon their first appearance before the presiding federal judicial officer. At this hearing, the judicial officer is to consider certain information relating to the offense and to the person charged in determining whether to release or detain the individual. It is assumed that the PSA will provide this information to federal judicial officers in all federal judicial districts. Since the Pretrial Services Act of 1982 provided for the expansion of pretrial services into all judicial districts, this provision of the bill has no budgetary effect.

Enactment and implementation of S. 215 will result in a significant increase in the number of days of pretrial detention spent by defendants. Those individuals who are arrested for certain violent crimes, who have a prior felony conviction record, or who are charged with a drug violation specified in the bill are assumed to be detained prior to trial. In total, about 75 percent of those for whom hearings would be held, or about 11 percent of federal defendants, are expected to be detained prior to trial.

It is estimated that each of these individuals would be detained an average of 21 additional days prior to their trials as a result of these procedures. The U.S. Marshals Service estimates that neither the per diem care costs of detention (now about $32 per day) nor the cost of transporting an arrestee (about $250 per individual) would change as a result of this increase. Thus, the increased cost to the federal government for pretrial detention is estimated to be approximately $1.1 million in fiscal year 1983, rising to $4.6 million by fiscal year 1984 and $5.6 million by fiscal year 1988.

For the two periods between trial and sentencing and between sentencing and execution of sentence, CBO assumes that of those individuals detained prior to trail and found guilty, 75 percent will be detained. Applied to an average wait of 30 days, during each period, this increased detention is estimated to cost approximately $1.1 million in fiscal year 1983, escalating to $4.7 million by fiscal year 1984, and $5.6 million by 1988. The estimate also assumes that the number of defendants released from detention via appeals will equal the number detained through appeal by the government, resulting in no net change in post-trial detention costs.

The mandatory additional sentence for those individuals convicted of an offense while on release is expected to result in increased

federal costs. Based on averages over the past five years, CBO estimates that, of the total population of federal defendants, 4.9 percent (over 1,500 per year) will be convicted of violating their release conditions, and that these individuals will spend an average of 500 additional days in prison. Imposing the mandatory additional sentences is expected to increase federal costs by approximately $13.0 million in fiscal year 1984, increasing to $42.5 million in fiscal year 1988. This reflects an assumption that the bill will become effective on July 1, 1983, and that the increased incarceration will start by the beginning of fiscal year 1984.

Finally, CBO attributes no additional cost to the federal government for the section of the bill relating to penalties for failure to appear. Because the bill establishes no minimum penalties, and because reliable data relating a defendant's failure to appear to the original offense charged is unavailable, there is no basis for estimating costs to the government.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None

8. Previous CBO estimate: None.

9. Estimate prepared by: Charles Essick (226-2860)

10. Estimate approved by: C. G Nuckols for James L. Blum, Assistant Director for Budget Analysis.

Changes in Existing Law

In compliance with subsection (12) of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1554 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

TITLE 18: CRIMES AND CRIMINAL PROCEDURE; PART II, CRIMINAL PROCEDURE; CHAPTER 207

[§ 3141. Power of courts and magistrates

[Bail may be taken by any court, judge or magistrate authorized to arrest and commit offenders, but only a court of the United States having original jurisdiction in criminal cases, or a justice or judge thereof, may admit to bail or otherwise release a person charged with an offense punishable by death.]

§ 3141. Release and detention authority generally

(a) Pending Trial.—A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

(b) Pending Sentence or Appeal.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

[§ 3142. Surrender by bail

[Any party charged with a criminal offense who is released on the execution of an appearance bail bond with one or more sureties, may, in vacation, be arrested by his surety, and delivered to the marshal or his deputy, and brought before any judge or other officer having power to commit for such offense; and at the request of such surety, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneretur of such surety; and the person so committed shall be held in custody until discharged by due course of law.]

§ 3142. Release or detention of a defendant pending trial

(a) IN GENERAL.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on his personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of subsection (b);

(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion pursuant to the provisions of subsection (d); or

(4) detained pursuant to the provisions of subsection (e).

(b) RELEASE ON PERSONAL RECOGNIZANCE OR UNSECURED APPEARANCE BOND.—The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) RELEASE ON CONDITIONS.—If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(B) maintain employment, or, if unemployed, actively seek employment;

(C) maintain or commence an educational program;

(D) abide by specified restrictions on his personal associations, place of abode, or travel;

(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(G) comply with a specified curfew;

(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(J) undergo available medical or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(K) execute an agreement to forefeit upon failing to appear as required, as such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

(d) TEMPORARY DETENTION TO PERMIT REVOCATION OF CONDITIONAL RELEASE, DEPORTATION, OR EXCLUSION.—If the judicial officer determines that—

(1) the person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

he shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B), the person has the burden of proving to the court that he is a citizen of the United States or is lawfully admitted for permanent residence.

(e) DETENTION.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that—

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under 18 U.S.C. 924(c).

(f) DETENTION HEARING.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community in a case—

(1) upon motion of the attorney for the Government, that involves—

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed; or

(2) upon motion of the attorney for the Government or upon the judicial officers own motion, that involves—

(A) a serious risk that the person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.

(g) FACTORS TO BE CONSIDERED.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) CONTENTS OF RELEASE ORDER.—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) CONTENTS OF DETENTION ORDER.—In a detention order issued pursuant to the provisions of subsection (e), the judicial officer—

(1) shall include written findings of fact, and a written statement, or a written reference to the hearing record, concerning the reasons for the detention;

(2) shall direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility in accordance with regulations promulgated pursuant to the provisions of subsection (j); and

(3) may recommend that the person receive special medical or similar treatment or attention, but the Attorney General shall not be bound by such a recommendation.

(j) CUSTODY WHILE AWAITING TRIAL.—The Attorney General shall promulgate regulations governing custody of persons detained pending trial. The regulations shall provide that—

(1) to the extent practicable, the person be confined—

(A) in a facility located near the court in which the person will have to appear;

(B) separate from persons awaiting or serving sentences or being held in custody pending appeal; and

(C) separate from persons who are defendants in the same case;

(2) the person be afforded reasonable opportunity for private consultation with his council and, to the extent practicable, for private visits with his family or other persons;

(3) on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined shall deliver the person to the custody of a United States Marshal or other appropriate Federal law enforcement officer for the purpose of an appearance in connection with a court proceeding or for another official purpose; and

(4) the person may be released temporarily, in the custody of a United States Marshal or other appropriate person, if necessary for preparation of the person's defense or for another compelling reason.

(k) PRESUMPTION OF INNOCENCE.—Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

[§ 3143. Additional bail

[When proof is made to any judge of the United States, or other magistrate authorized to commit on criminal charges, that a person previously released on the execution of an appearance bail bond with one of more sureties on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof.]

§ 3143. Release or detention of a defendant pending sentence or appeal

(a) RELEASE OR DETENTION PENDING SENTENCE.—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142 (b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

(b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT.—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person

or the community if released pursuant to section 3142 (b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

(c) RELEASE OR DETENTION PENDING APPEAL BY THE GOVERNMENT.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

[§ 3144. Cases removed from State courts

[Whenever the judgment of a State Court in any criminal proceeding is brought to the Supreme Court of the United States for review, the defendant shall not be released from custody until a final judgment upon such review, or, if the offense be bailable, until a bond, with sufficient sureties, in a reasonable sum, is given.]

§ 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

[§ 3145. Patties and witnesses—(Rule)

[SEE FEDERAL RULES OF CRIMINAL PROCEDURE

[On Preliminary Examination, Rule 5(b).
Before conviction; amount; sureties, forfeiture; exoneration, Rule 46.
Pending sentence, Rule 32(a).
Pending appeal or certiorari, Rules 38 (b), (c), 39(a), 46(a, 2).[1]
Witness, Rule 46.]

§ 3145. Review and appeal of a release or detention order

(a) REVIEW OF A RELEASE ORDER.—If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

(b) REVIEW OF A DETENTION ORDER.—If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) APPEAL FROM A RELEASE OR DETENTION ORDER.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

[§ 3146. Release in noncapital cases prior to trial

[(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, and combination of the following conditions:

[(1) place the person in the custody of a designated person or organization agreeing to supervise him;

[(2) place restrictions of the travel, association, or place of abode of the person during the period of release;

[(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash, or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

[(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu therof; or

[(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

[(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

[(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

[(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer is the district may review such conditions.

[(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided,* That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

[(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

[(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.]

§ 3146. Penalty for failure to appear

(a) OFFENSE.—A person commits an offense if, after having been released pursuant to this chapter—

(1) he knowingly fails to appear before a court as required by the conditions of his release; or

(2) he knowingly fails to surrender for service of sentence pursuant to a court order.

(b) GRADING.—If the person was released—

(1) in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction, for—

(A) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, he shall be fined not more than $25,000 for or imprisoned for not more than ten years, or both;

(B) an offense punishable by imprisonment for a term of five or more years, but less than fifteen years, he shall be fined not more than $10,000 or imprisoned for not more than five years, or both;

(C) any other felony, he shall be fined not more than $5,000 or imprisoned not more than two years, or both; or

(D) a misdemeanor, he shall be fined not more than $2,000 or imprisoned more than one year or both; or

(2) for appearance as a material witness, he shall be fined no more than $1,000 or imprisoned for not more than one year, or both.

A term of imprisonment imposed pursuant to this section shall be consecutive to the sentence of imprisonment for any other offense.

(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appeared or surrender, and that the defendant appeared or surrendered as soon as such circumstances ceased to exist.

(d) DECLARATION OF FORFEITURE.—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) or is subject to the release condition set forth in section 3142(c)(2)(K), or (c)(2)(L), the judicial officer may, regardlesss of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

[§ 3147. Appeal from conditions of release

[(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

[(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if its is supported by the proceedings below. If the order is not supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly.]

§ 3147. Penalty for an offense committed while on release

A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—

(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

[§ 3148. Release in capital cases or after conviction

[A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: *Provided,* That other rights to judicial review of conditions of release or orders of detention shall not be affected.]

§ 3148. Sanctions for violation of a release condition

(a) AVAILABLE SANCTIONS.—A person who has been released pursuant to the provisions of section 3142, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

(b) REVOCATION OF RELEASE.—The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with a district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

(1) finds that there is—

(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

(B) clear and convincing evidence that the person has violated any other condition of his release; and

(2) finds that—

(A) based on the factors set forth in section 3142(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or

pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, he shall treat the person in accordance with the provisions of section 3142 and may amend the conditions of release accordingly.

(c) PROSECUTION FOR CONTEMPT.--The judge may commence a prosecurtion for contempt, pursuant to the provisions of section 401, if the person has violated a condition of his release.

[§ 3149. Release of material witnesses

[If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpena, a judicial officer shall impose conditions of release pursuant to section 3146. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.]

§ 3149. Surrender of an offender by a surety

A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer. The judicial officer shall determine in accordance with the provisions of section 3148(b) whether to revoke the release of the person, and may absolve the surety of responsibility to pay all or part of the bond in accordance with the provisions of rule 46 of the Federal Rules of Criminal Procedure. The person so committed shall be held in official detention until released pursuant to this chapter or another provision of law.

[§ 3150. Penalties for failure to appear

[Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.]

§ 3150. Applicability to a case removed from a State court

The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.".

[§ 3151. Contempt

[Nothing in this chapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.]

§ 3154. Functions and powers of pretrial services agencies

Each pretrial services agency shall perform such of the following functions as the district court to be served may specify:

(1) Collect, verify, and report promptly to the judicial officer information pertaining to the pretrial release of each person charged with an offense, **[**and recommend appropriate release conditions for each such person,**]** *and, where appropriate, include a recommendation as to whether each such person should be released or detained and, if release is recommended, recommend appropriate conditions of release* but such information as may be contained in the agency's files or presented in its report or which shall be divulged during the course of any hearing shall be used only for the purpose of a bail determination and shall otherwise be confidential. In their respective districts, the Division of Probation or the Board of Trustees shall issue regulations establishing policy on the release of agency files. Such regulations shall create an exception to the confidentiality requirement so that such information shall be available to members of the agency's staff and to qualified persons for purposes of research related to the administration of criminal justice. Such regulations may create an exception to the confidentially requirement so that access to agency files will be permitted by agencies under contract pursuant to paragraph (4) of this section; to probation officers for the purpose of compiling a presentence report and in certain limited cases to law enforcement agencies for law enforcement purposes. In no case shall such information be admissible on the issue of guilt in any judicial proceeding, and in their respective districts, the Division of Probation or the Board of Trustees may permit such information to be used on the issue of guilt for a crime committed in the course of obtaining pretrial release.

(2) Review and modify the reports and recommendations specified in paragraph (1) for persons seeking release pursuant to **[**section 3146(e) or section 3147.**]** *section 3145.*

(3) Supervise persons released into its custody under this chapter.

* * * * * * *

§ 3156. Definitions

(a) as used in sections **[**3146**]** *3141*–3150 of this chapter—

(1) The term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to **[**bail or otherwise**]** *detain or* release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia; **[**and**]**

(2) The term "offense" means any criminal offense, other than an offense triable by court-marshal, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress[.] *; and*

(3) The term "felony" means an offense punishable by a maximum term of imprisonment of more than one year; and

(4) The term "crime of violence" means—

(A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or

(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. and;

(b) As used in sections 3152-3155 of this chapter—

(1) the term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to [bail or otherwise] *detain or* release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court martial, military commission, provost court, or other military tribunal).

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE

PART II. CRIMINAL PROCEDURE

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[CHAPTER 207—RELEASE]

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CHAPTER 207—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE; PART II, CRIMINAL PROCEDURE; CHAPTER 203

§ 3041. Power of courts and magistrates

For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trail before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond [determining to hold the prisoner for trial] *determining, pursuant to the provisions of section 3142 of this title, whether to detain or conditionally release the prisoner prior to trail* or to discharge him from arrest.

§ 3042. Extraterritorial jurisdiction

Section 3041 of this title shall apply in any country where the United States exercises extraterritorial jurisdiction for the arrest and removal therefrom to the United States of any citizen or national of the United States who is a fugitive from justice charged with or convicted of the commission of any offense against the United States, and shall also apply throughout the United States for the arrest and removal therefrom to the jurisdiction of any officer or representative of the United States vested with judical authority in any country in which the United States exercises extra-

territorial jurisdiction, of any citizen or national of the United States who is a fugitive from justice charged with or convicted of the commission of any offense against the United States in any country where it exercises extraterritorial jurisdiction.

Such fugitive first mentioned may, by any officer or representative of the United States vested with judicial authority in any country in which the United States exercises extraterritorial jurisdiction and agreeable to the usual mode of process against offenders subject to such jurisdiction, be arrested and [imprisoned or admitted to bail.] detained or conditionally released pursuant to section 3142 of this title as the case may be, pending the issuance of a warrant for his removal, which warrant the principal officer or representative of the United States vested with judicial authority in the country where the fugitive shall be found shall reasonably issue, and the United States marshal or corresponding officer shall execute.

Such marshal or other officer, or the deputies of such marshal or officer, when engaged in executing such warrant without the jurisdiction of the court to which they are attached, shall have all the powers of a marshal of the United States so far as such powers are requisite for the prisoner's safekeeping and the execution of the warrant.

[§ 3043. Security of the peace and good behavior

[The justices or judges of the United States, the United States magistrates, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them.]

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§ 3062. General arrest authority for violation of release conditions

A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 207 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3142(c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), or (c)(2)(M), or, if the violation involves a failure to remain in a specified institution as required, a condition imposed pursuant to section 3142(c)(2)(J).

CHAPTER 203—ARREST AND COMMITMENT

Sec.

3041. Power of courts and magistrates.
3042. Extraterritorial jurisdiction.
[3043. Security of the peace and good behavior.]
3043. Repealed.
3044. Complaint—Rule.
3045. Internal Revenue violations.
3046. Warrants or summons—Rule.
3047. Multiple warrants unnecessary.
3048. Commitment to another district; removal—Rule.

3049. Warrant for removal.
3050. Bureau of Prisons employees' powers.
3052. Powers of Federal Bureau of Investigation.
3053. Powers of marshals and deputies.
3054. Officer's powers involving animals and birds.
3055. Officers' powers to suppress Indian liquor traffic.
3056. Secret Service powers.
3057. Bankruptcy investigations.
3058. Interned belligerent nationals.
3059. Rewards and appropriations therefor.
3060. Preliminary examination.
3061. Powers of postal inspectors.
3062. General arrest authority for violation of release conditions.

TITLE 18: CRIMES AND CRIMINAL PROCEDURE; PART II, CRIMINAL PROCEDURES; CHAPTER 235

§ 3731. Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the pretrial release of a person charged with an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE; PART II, CRIMINAL PROCEDURE; CHAPTER 237

§ 3772. Procedure after verdict

The Supreme Court of the United States shall have the power to prescribe from time to time rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein author-

ized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or [bail] *release pending appeal may be allowed.*

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TITLE 18: CRIMES AND CRIMINAL PROCEDURE; PART III, CRIMINAL PROCEDURE; CHAPTER 315

§ 4282. Arrested but unconvicted persons

On the relase from custody of a person arrestd on a charge of violating any law of the United States or of the territory of Alaska, but not indicted nor informed against, or indicted or informed against but not convicted, [and not admitted to bail,] *and detained pursuant to chapter 207* or a person held as a material witness [and unable to make bail] the court in its discretion may direct the United States marshal for the district wherein he is released, pursuant to regulations promulgated by the Attorney General, to furnish the person so released with transportation and subsistence to the place of his arrest, or, at his election, to the place of his bona fide residence if such cost is not greater than to the place of arrest.

TITLE 28: JUDICIARY AND JUDICIAL PROCEDURE;SECTION 636

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations [impose conditions of release under section 3146 of title 18] *issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial* and take acknowledgements, affidavits, and depositions; and

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TITLE 18: FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance before the Magistrate

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a sum-

mons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor Offenses. If the charge against the defendant is a minor offense triable by a United States magistrate under 18 U.S.C. § 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrate.

(c) Offenses Not Triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and [shall admit the defendant to bail] *shall detain or conditionally release the defendant as provided by statute or in these rules.*

* * * * * * *

Rule 15. Depositions

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is [committed for failure to give bail to appear to testify at a trial or hearing] *detained pursuant to 18 U.S.C. § 3144* the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

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Rule 40. Commitment to Another District; Removal

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[**(f) Bail.**—If bail was previously fixed in another district where a warrant, information or indictment issued, the federal magistrate shall take into account the amount of bail previously fixed and the reasons set forth therefor, if any, but will not be bound by the amount of bail previously fixed. If the federal magistrate fixes bail different from that previously fixed, he shall set forth the reasons for his action in writing.]

* * * * * * *

***(f) Release or Detention.**—If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United*

States Code, in another district where a warrant, information or indictment issued, the Federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the Federal magistrate amends the release or detention decision or alters the conditions of release, he shall set forth the reasons for his action in writing.

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Rule 46. Release from Custody

(a) Release Prior to Trial. Eligibility for release prior to trial shall be in accordance with 18 U.S.C. **[**§ 3146, § 3148, or § 3149.**]** *3142 and 3144.*

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(c) Pending Sentence and Notice of Appeal. Eligibility for release pending sentence or pending notice of appeal or expiration of the time allowed for filing notice of appeal, shall be in accordance with 18 U.S.C. **[**§ 3148.**]** *3143.* The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

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(e) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

[(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.**]**

(2) Setting Aside.—The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into custody of if it otherwise appears that justice does not require the forfeiture.; and

• • • • • • •

(h) Forfeiture of Property.—Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U.S.C. **[** *3142(c)(2)(K) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.*

Rule 54. Application and Exception

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(b) Proceedings.

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(3) Peace Bonds. These rules do not alter the power of judges of the United States magistrates to hold to security of the peace and for good behavior **[**under 18 U.S.C. § 3043, and**]** under Revised

Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

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TITLE 28: FEDERAL RULES OF APPELLATE PROCEDURE

Rule 9. Release in Criminal Cases

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(c) Criteria for release. The decision as to release pending appeal shall be made in accordance with Title 18, U.S.C. § **[**3148**]** *3143*. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

* * * * * * *

Amend the title so as to read:

To amend the Bail Reform Act of 1966 to permit consideration of danger to the community in setting pretrial release conditions, to expand the list of statutory release conditions, to establish a more appropriate basis for deciding on post-conviction release, and for other purposes.

Appendix

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., April 19, 1983.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to a request for the views of the Department of Justice on a proposed amendment to S. 215, the bail reform legislation now under consideration by the Judiciary Committee, that would amend 18 U.S.C. 3164, the provision of the Speedy Trial Act which limits to 90 days the period during which a person may be held in detention pending trial. If a detained person is not released within the current 90 day period, he must be released pursuant to conditions set by the court. In addition to this 90 day limit on pretrial detention, section 3164 also requires that the trial of any person held in detention be afforded priority. The proposed amendment would reduce the current 90 day period of limitation to 60 days. The Department of Justice strongly opposes this amendment.

The current 90 day limit established under section 3164 was originally set on an interim basis. In its 1979 review of the Speedy Trial Act, the Congress adopted this period on a permanent basis.[1] Enactment of the bail reform legislation now before the Committee provides no rationale, in and of itself, for the Congress to now reduce the permitted period of pretrial detention by one-third. Although S. 215 would for the first time incorporate statutory procedures for the issuance of pretrial detention orders and permit consideration of defendant dangerousness as a general matter in all release decisions, under our current bail system—the very context in which Congress reviewed and adopted as a permanent provision the present 90 day limit—pretrial detention is not an uncommon phenomenon. In fiscal year 1982, 18.4 percent of all federal defendants were subject to some period of pretrial detention. While slightly more than half of these defendants (52.2 percent) were in custody for 10 days or less, 39.5 percent were in custody from 31 to 90 days.[2] Despite the fact that current bail laws do not permit consideration of defendant dangerousness, many believe it is concerns about dangerousness rather than flight risk that have led to the de-

[1] Public Law 96-43, § 7, Aug. 2, 1979, 98 Stat. 329.
[2] "Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Court—1982" (hereinafter cited as "1982 Annual Report"), 352-355 (Table D-13).

tention of a good proportion of these defendants because of their inability to meet high money bonds.

Certainly, one of the primary reasons for this Department's strong support of S. 215 is that it would specifically authorize pretrial detention in limited circumstances. We have been very much concerned by instances in which even extremely high money bonds have been inadequate to assure appearance and in which judges, operating under the constraints of current law, have released persons who pose especially severe threats to the safety of others. However, in our support of this legislation we have never asserted that pretrial detention would be appropriate for more than a small minority of federal defendants, and anticipate that enactment of this legislation would result in only a minor enlargement of the present number of persons subject to detention.

Indeed, one of the most laudatory aspects of this legislation is that it recognizes that there is already a substantial incidence of pretiral detention in the federal system, and that is responds to this phenomenon by providing for the first time a set of statutory criteria that define the circumstances in which detention may be appropriate and by requiring a pretrial detention hearing with important procedural safeguards in which the court, govenment, and defendant may address the issue of pretrial detention squarely. The provisions of S. 215 do not set the stage of a wholesale increase in the incidence of pretrial detention, but rather establish procedures to assure that it is imposed with greater rationality and fairness. In sum, enactment of this legislation will not herald a change in circumstances so significant that the Congress' 1979 determination with respect to detention limits in section 3164 should be overturned.

Aside from the fact that the bail reform legislation under consideration provides no justification for reduction of the Speedy Trial Act's current 90 day limitation on detention, the 60 day proposal is on its own merits objectionable. As noted above, nearly 40 percent of federal defendants subject to some term of detention remain in custody from 31 to 90 days. The number of defendants in this group in fiscal year 1982 was 2,614.[3] Unfortunately no further statistical breakdown is available, so we do not know the exact number of these defendants held in excess of 60 days whose cases would have to be accommodated by substantially accelerated trial dates were the proposed 60 day limit enacted. Nonetheless, it is likely that a good proportion fall into this category.

The potential difficulties is significantly accelerating the trials of such defendants so as to avoid the release of persons who are severe flight risks or pose especially grave dangers to community safety are aggravated by the fact that the incidence of pretrial detention is not uniform across all districts. Instead, there is considerable variation among the districts, with relatively high rates of detention occurring in a handful of districts, primarily those which, because of their geographical location, are particularly concerned about defendants fleeing the country to avoid prosecution. This phenomenon has been noted by the Administrative Office of the United States Courts, in citing the Districts of Southern California,

[3] Ibid.

Arizona, and Southern Florida, as the districts with the highest detention rates:

> California, Southern Florida and Arizona are border districts and detention is required to be certain that the defendant will be available for trial. For Florida Southern, many defendants are highly mobile and are being prosecuted for drug law violations.[4]

As the members of the Committee are no doubt aware, some of the most egregious examples of the failures of the current bail system have involved major drug traffickers in South Florida. Experience has shown that with respect to such defendants, money bonds that would, in other contexts, appear adequate to assure defendant appearance have proven ineffective, and this district's high detention rate is understandable in light of this experience. The impact of the proposed 60 day deadline in a district such as Southern Florida would be devastating. For example, despite an admirable average compliance rate of 96.3 percent with the Speedy Trial Act's 70 day limit on the period from indictment to trial across all districts, South Florida, with a criminal docket that has swelled in response to an alarming crime rate, much of which is associated with the illegal drug trade, had a compliance rate of only 77.5 percent, the lowest rate of any district within the United States.[5] In this setting, there is little leeway to further accelerate trials to accommodate the proposed 60 day deadline, and we are thus very much concerned that imposition of this proposed limit would result in the release of major drug traffickers who are serious flight risks. As our experience in South Florida has shown, these defendants have both enormous resources and foreign contacts that enable them to flee the country almost immediately upon release.

The difficulties in accelerating trial schedules to meet the proposed 60 day deadline must also be understood in the context of other aspects of the Speedy Trial Act. Where a case is commenced with indictment, trial must occur within 70 days. In such cases, the proposed 60 day detention deadline would not require significant advance of the trial date, although we reiterate that in jurisdictions with particularly crowded criminal dockets such as South Florida even seemingly modest further manipulations of trial schedules may pose significant problems. However, where a case is commenced by arrest and indictment then follows, a substantial acceleration would be required. In these cases, the government must indict within 30 days, and trial must occur within 70 days of the indictment. Thus, the proposed 60 day limit would reduce by 40 percent for pretrial detainees the maximum period that could elapse from arrest to trial.

In cases commenced by arrest the problem posed by compliance with the proposed 60 day deadline is not confined to the substantial acceleration of trial date that would be required, but also involves the lack of flexibility in setting a trial date within this schedule. After indictment, defendants are afforded under the statute a right

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[4] 1982 Annual Report, supra note 2, at 150.

[5] Id. at 149, 348-9 (Table D-11). Of all districts, only the Northern Marianas had a compliance rate lower than Southern Florida's.

to a minimum 30 day trial preparation period.[6] This means that in cases in which indictment occurs at or near the expiration of the Act's 30 day limit on the time that may pass from arrest to indictment, there will be only a few days (or in the case of an indictment falling on the 30th day, a single day) after the defendant's post-indictment trial preparation period has elapsed in which trial may be scheduled so as to avoid the release of a defendant who has been determined to be a serious flight risk or danger to the community.[7] Reserving one of a very limited number of trial dates in advance will be particularly difficult in cases in which pretrial motions and other matters—matters which generally give rise to excludable delay—are being pursued.[8] In these cases, the dates on which the Act's various limitation periods expire will vary from day-to-day as pretrial matters arise and are concluded. In sum, in cases initiated by arrest, the government and the courts will be "boxed in" by the proposed 60 day limit to but a few days in which trial may be held in order to avoid the sanction of release of the defendant. Such inflexibility ignores the scheduling problems the courts and government must now address to comply with the larger scheme of deadlines under the Speedy Trial Act, deadlines which, if not met, entail the sanction of dismissal of the charges against the defendant.

Clearly, the spectre of the proposed 60 day limit operating to require the release of defendants who are significant flight risks or extreme threats to the safety or others will be of greatest concern in cases commenced by arrest rather than indictment. However, it is with respect to these very types of defendants that will be inadvisable to delay arrest until an indictment is, or is about to be, filed. Obviously, it would ill serve the interests of the public to encourage delay in arresting such persons. Already the arrest to indictment time limitations of the Speedy Trial Act have led to an increase in the proportion of criminal cases commenced by indictment rather than arrest.[9] The proposed 60 day detention deadline

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[6] Although section 3161(c)(2) speaks of the 30 day trial preparation period commencing with the defendant's first appearance through counsel, this provision has been interpreted to require that the 30 day period commence with indictment if this occurs after the first appearance. See Committee on the Administration of the Criminal Law of the Judicial Conference of the United States, "Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended," 10–11 (August, 1981).

[7] The "worst case" scenario evoked by the proposed 60 day limit under section 3164 would occur in instances in which no grand jury is sitting at the time the defendant is arrested. In such cases, the government is permitted an additional 30 days in which to indict, but this extension does not constitute an excludable delay under section 3161(h), and so does not extend the time limits for detention under section 3164. In such cases, therefore, the defendant could assure his release simply by insisting on his 30 day trial preparation period. Such extensions of the indictment period are, however, extremely rare. (Only 0.3 percent of cases in fiscal year 1981 involved such extensions. Administrative Office of the United States Courts, "Report for the Year Ended June 30, 1981 on the Implementation of Title I of the Speedy Trial Act of 1974," 123.) Nonetheless, the proposed amendment's failure to accommodate such cases, as rare as they may be, is untenable.

[8] It is the position of the Judicial Conference that periods of excludable delay do not apply to the 30 day trial preparation period to which defendants are entitled. See "Guidelines," supra note 6, at 12–13. However, in *United States* v. *Mers* (No. 81–7777, decided March 21, 1983), the Eleventh Circuit held that periods of excludable delay do apply to extend the 30 day trial preparation period. If this additional scheduling variable must also be considered, setting a firm trial date that will accommodate the existing indictment and trial deadlines, the defendant's 30 day trial preparation period, and the proposed 60 day deadline on detention may be all the more difficult.

[9] United States Department of Justice. "The Processing of Federal Criminal Case Under the Speedy Trial Act of 1974 (as Amended 1979)" 79–86 (July 1980).

would further aggravate this situation and it would do so with respect to the highest risk category of defendants.

In essence, the proposed 60 day limit will present prosecutors with a Hobson's choice. On the one hand, if they choose to delay arrest until indictment occurs or is imminent so as to mitigate the possibility that the defendant will be released because the 60 day limit will elapse before a trial may be set, they then run the risk that the defendant will flee or commit another offense before the indictment is returned. On the other hand, if they choose to arrest immediately and then indict, they may have eliminated the immediate danger, but then run the risk that the defendant will later be released if the crowded criminal docket in their district cannot accommodate a trial date within the very limited number of days that will exist between the expiration of the defendant's statutorily guaranteed trial preparation period and the running of the proposed 60 day period.

We have no doubt that the proposed amendment is well intentioned and agree that a speedy trial is especially important where a defendant must, for the protection of the integrity of the judicial process or the safety of the community, be held pending trial. But the problems posed by the proposed reduction to 60 days of the Speedy Trial Act's present limit on pretrial detention are simply too great to justify its enactment as a menas of furthering this principle. We are deeply concerned that this proposed amendment of section 3164 will result in delays in arresting defendants who are significant flight risks or pose grave danger to the safety of the innocent public.

The Department of Justice therefore strongly urges that the Committee retain the current 90 day limit of section 3164. As we noted at the outset, there is no aspect of the bail reform legislation being considered by the Committee that requires that this period, enacted on a permanent basis only four years ago, now be reduced by one-third. Moreover, we stress that superimposed on this current 90 day limit is section 3164's present requirement that all cases involving pretrial detention be afforded priority. Thus, the present 90 day deadline sets only the outer limit of the time in which a detainee must be tried or released. If an earlier trial date may be set, the law currently requires that this be done.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General,
Office of Legislative Affairs.

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